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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, CENTRAL DISTRICT

OMAR RODRIGUEZ; CINDY GUILLEN-GOMEZ; STEVE KARAGIOSIAN; ELFEGO RODRIGUEZ; AND JAMAL CHILDS,

Plaintiffs,

-vs-

BURBANK POLICE DEPARTMENT; CITY OF BURBANK; AND DOES 1 THROUGH 100, INCLUSIVE.

Defendants.

CASE NO.: BC 414 602

Assigned to: Hon. Joanne B. O'Donnell, Judge

NOTICE OF LODGING OF FEDERAL AUTHORITIES IN SUPPORT OF PLAINTIFF'S OPPOSITIONS TO DEFENDANT'S MOTIONS IN LIMINE NOS. 5-6

Complaint Filed: May 28, 2009

Final Status Conference:
Date: June 8, 2011
Time: 9:00 a.m.
Dept. 37

Trial Date:
June 8, 2011 Jury Trial

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5/25

NOTICE IS HEREBY GIVEN TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD that the following federal authorities are hereby lodged with this Court in support of Opposition to Defendant's Motions in Limine Nos. 5-6 as follows:

1. Cruz v. Coach Stores, Inc. (1999 2nd Cir.) 202 F.3d 560
2. Davis v. Monsanto Chemical Co. (1988 6th Cir.) 858 F.2d 345
3. Doe v. Starbucks, Inc. (2009 C.D. Cal.) 2009 U.S. Dist. LEXIS 118878
4. McGinest v. GTE Service Corp. (2004 9th Cir.) 360 F.3d 1103
5. Meritor Savings Bank, FSB v. Vinson (1986) 477 U.S. 57

DATED: May 25, 2011

Respectfully submitted,

LAW OFFICES OF RHEUBAN & GRESEN

By: _____
India S. Thompson

202 F.3d 560, *; 2000 U.S. App. LEXIS 889, **;
81 Fair Empl. Prac. Cas. (BNA) 1762; 45 Fed. R. Serv. 3d (Callaghan) 1158

YVETTE CRUZ, Plaintiff-Appellant, v. COACH STORES, INC., Defendant-Appellee, DAVID OTANI, WILLIAM BETTS, DIANE LEWIS, SARA LEE CORPORATION, and HERVE HERIVEAUX, Defendants.

Docket No. 98-9654

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

202 F.3d 560; 2000 U.S. App. LEXIS 889; 81 Fair Empl. Prac. Cas. (BNA) 1762; 45 Fed. R. Serv. 3d (Callaghan) 1158

October 7, 1999, Argued
January 20, 2000, Decided

PRIOR HISTORY: [**1] Appeal from a final judgment of the United States District Court for the Southern District of New York (Jed S. Rakoff, Judge) dismissing plaintiff-appellant's claims for discriminatory failure to promote and retaliation, and granting summary judgment in favor of defendant-appellee on plaintiff-appellant's termination, hostile work environment, and disparate impact claims.

DISPOSITION: Affirmed in part, vacated in part, and remanded.

COUNSEL: PETER G. EIKENBERRY, New York, NY, (Laurence M. Shanahan, Matthew G. DeOreo, on the brief), for plaintiff-appellant.

LAUREN REITER BRODY, Rosenman & Colin LLP, New York, NY, for defendant-appellee.

JUDGES: Before: JACOBS, CALABRESI and SOTOMAYOR, Circuit Judges.

OPINION BY: SOTOMAYOR

OPINION

[*564] SOTOMAYOR, *Circuit Judge:*

This appeal concerns plaintiff-appellant Yvette Cruz's claims of race and sex discrimination against her former employer, defendant-appellee Coach Stores, Inc. ("Coach"). Cruz brought this action in 1996, claiming that Coach had violated federal, state, and city civil rights laws by, *inter alia,* failing to promote her and terminating her because of her race, retaliating against her for exercising Title VII-protected rights, and tolerating [**2] an environment of discriminatory harassment. On September 25, 1997, the district court (Jed S. Rakoff, Judge) dismissed Cruz's failure to promote and retaliation claims pursuant to *Fed. R. Civ. P. 12(b)(6)* for failure to state a claim for relief. On November 17, 1998, the court granted summary judgment to Coach pursuant to *Fed. R. Civ. P. 56* on Cruz's remaining claims. *See Cruz v. Coach Stores, Inc., 1998 U.S. Dist. LEXIS 18051, 1998 WL 812045* (S.D.N.Y. Nov. 18, 1998). For the reasons that follow, we affirm the district court's dismissal of Cruz's failure to promote and retaliation claims. We also affirm its grant of summary judgment with respect to all claims other than Cruz's charge of hostile work environment harassment. On Cruz's harassment claim, we vacate the district court's judgment and remand the case for further proceedings consistent with this opinion.

BACKGROUND

Yvette Cruz, a Hispanic woman, began working at Coach as a part-time sales associate in 1990. In 1991, she was promoted to a secretarial position, which she held until her termination in 1995. In June of 1994, Cruz alleges, her supervisor informed her that Coach was planning to create a new "Coordinator of Systems Operations" [**3] job in January 1995, and promised Cruz that she would receive that position as soon as it became available. Coach never created the position, however, and Cruz remained in her secretarial job until her termination from the company.

Cruz's termination from Coach stemmed from events occurring on November 17, 1995. On that day, Cruz's co-worker, Herve Heriveaux, approached Cruz during her lunch hour and commented that her "nipples [were] erect." An argument ensued between Cruz and Heriveaux, during which Heriveaux stepped extremely

close to Cruz and called her a "f ing cunt." Cruz then slapped Heriveaux, who responded by placing her in a headlock. The altercation ended when Cruz's supervisor intervened.

Three days later, following an investigation by Coach's Human Resources Department, both Cruz and Heriveaux were terminated pursuant to Coach's rule against [*565] "physical or verbal assault while on company premises." Cruz then filed a timely complaint with the Equal Employment Opportunity Commission, alleging that Coach had terminated her because of her race and charging the company with failure to promote and retaliation. Cruz also claimed that throughout the time she worked [**4] at Coach, the company "condoned unpermitted touching by supervisors." Upon receiving a right-to-sue letter, she filed the instant action under *42 U.S.C. § 1981 (1994)*, Title VII of the Civil Rights Act of 1964, *42 U.S.C. § 2000e et seq. (1994)*, the New York State Human Rights Law, N.Y. exec. Law § 290 *et seq.* (McKinney 1993 & Supp. 1999), and the New York City Administrative Code, N.Y.C. Admin. Code § 8-107 (1998). The district court dismissed Cruz's failure to promote and retaliation claims pursuant to *Fed. R. Civ. P. 12(b)(6)* and granted Coach's summary judgment motion on all remaining claims pursuant to *Fed. R. Civ. P. 56*. This appeal followed.

DISCUSSION

I. *The 12(b)(6) dismissals*

We review *de novo* a 12(b)(6) dismissal for failure to state a claim for relief. *See Chance v. Armstrong, I/O, 143 F.3d 698, 701 (2d Cir. 1998)*. On appeal, we must accept all factual allegations in the complaint as true, and may affirm the district court's dismissal only where it "appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to [**5] relief." *Id.* (quoting *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957))* (internal quotation marks omitted).

A. *Failure to promote*

Cruz's failure to promote claim rests on her allegation that, because of her race, Coach reneged on its promise to promote her to Coordinator of Systems Operations. The district court dismissed this claim on the ground that Cruz had not alleged the elements of a prima facie case, because she had not claimed that she applied and was qualified for any position that was subsequently filled by a non-minority. We agree.

In order to establish a prima facie case for failure to promote, the plaintiff must allege that: 1) she "is a member of a protected class"; 2) her job performance was satisfactory; 3) she applied for and was denied promotion to a position for which she was qualified; and 4) the position "remained open and the employer continued to seek applicants." *Brown v. Coach Stores, Inc., 163 F.3d 706, 709 (2d Cir. 1998)* (citing *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973))*. [1] To meet this prima facie burden, Cruz alleged [**6] in her complaint that her supervisor promised her, in June 1994, that she would be promoted to the new "coordinator" position when Coach created that job in January 1995. The company did not create the coordinator position, however, in January 1995 or at any later time. Rather, Cruz alleges, in October 1995, Coach hired two non-minority individuals as "financial analysts" and gave these two employees many of the analytical responsibilities it had previously entrusted to Cruz.

> 1 Our consideration of claims brought under the state and city human rights laws parallels the analysis used in Title VII claims. *See Leopold v. Baccarat, Inc., 174 F.3d 261, 264 n.1 (2d Cir. 1999)* (New York state law); *Landwehr v. Grey Adver. Inc., 211 A.D.2d 583, 622 N.Y.S.2d 17, 18* (1st Dep't 1995) (New York City law).

Significantly, Cruz did not allege in her complaint that she ever applied for the financial analyst position or that she was qualified for that position. Nonetheless, Cruz argues that [**7] her complaint makes out a prima facie case for failure to promote because the financial analyst and coordinator positions were in fact the same job, and therefore an application for the coordinator position -- which she presumably completed, either formally or informally -- was [*566] in effect an application to be a financial analyst. Cruz's complaint, however, is devoid of any language from which the court might draw this conclusion. Although the complaint alleges that "[Cruz's] promised position [as coordinator] was given to the financial analysts," it does not describe the responsibilities of either position, the respective qualifications of Cruz and the financial analysts, or otherwise indicate that the two jobs were equivalent in any way. The complaint thus cannot be read to claim either that the two jobs were identical or that an application for coordinator was an adequate substitute for an analyst application. [2]

> 2 Even during oral argument, Cruz's counsel was unable to point to evidence in the record equating the coordinator and financial analyst positions. Although he cited testimony indicating that the two jobs were equivalent in the Coach employment hierarchy, this testimony does not support the point crucial to Cruz's failure to promote claim, *i.e.*, that the positions had similar responsibilities and qualifications.

[**8] Moreover, nothing in the complaint supports the inference that Cruz was qualified to be a financial

analyst. Even taking as true Cruz's allegation that Coach gave some of her responsibilities to the financial analysts, this fact alone does not establish that Cruz was competent to perform all the duties of the analyst job, and nothing else in the complaint helps to demonstrate that point. The complaint contains no information about either the responsibilities of a financial analyst or Cruz's employment skills, information that might have supported the inference that Cruz was fit for the position. Without such information, the complaint cannot be understood to allege, either directly or indirectly, that Cruz was qualified for the job. Absent this allegation, and absent any claim that she applied for the financial analyst position, Cruz's complaint fails to state a prima facie case for failure to promote.

B. *Retaliation*

Along with the failure to promote claim, Cruz's complaint alleged that Coach terminated her in retaliation for "defend[ing] herself against Heriveaux's sexual harassment and physical assault" in the altercation that ultimately led to her dismissal. Here as well, [**9] Cruz's complaint fails to state the elements of a prima facie retaliation claim. Accordingly, we affirm the district court's dismissal of this claim.

To establish a prima facie case for retaliation, a plaintiff must demonstrate "participation in protected activity known to the defendant, an employment action disadvantaging the person engaged in the protected activity, and a causal connection between the protected activity and the adverse employment action." *Johnson v. Palma, 931 F.2d 203, 207 (2d Cir. 1991)*. The term "protected activity" refers to action taken to protest or oppose statutorily prohibited discrimination. *See 42 U.S.C. § 2000e-3*; *see also, e.g., Wimmer v. Suffolk County Police Dep't, 176 F.3d 125, 134-35* (2d Cir.) (discussing scope of statute's "protected activity" provision), *cert. denied, 145 L. Ed. 2d 310, 120 S. Ct. 398 (1999)*. In this case, Cruz did not make out a prima facie case of retaliation because she did not claim to have engaged in any "protected activity" within the meaning of the statute. Slapping one's harasser, even assuming *arguendo* that Cruz did so in response to [**10] Title VII-barred harassment, is not a protected activity. While the law is clear that opposition to a Title VII violation need not rise to the level of a formal complaint in order to receive statutory protection, this notion of "opposition" includes activities such as "making complaints to management, writing critical letters to customers, protesting against discrimination by industry or by society in general, and expressing support of co-workers who have filed formal charges." *Sumner v. United States Postal Serv., 899 F.2d 203, 209 (2d Cir. 1990)*. It does not constitute a license for employees to engage in physical violence in order to protest discrimination.

[*567] We need not decide here whether violence in opposition to Title VII-prohibited behavior might, in some circumstances, be protected under Title VII's retaliation provision. In the situation at bar, Cruz had many options for resisting Heriveaux's offensive behavior, including leaving the room and reporting the incident to Human Resources. She selected none of these options, however, but chose instead to respond by slapping Heriveaux. Under these circumstances, Cruz's decision -- even if, as she claims, she believed [**11] herself to be acting in self-defense -- does not enjoy the protection of Title VII. Because Cruz engaged in no "protected activity," therefore, she has not established a prima facie case for retaliatory discharge.

II. *Coach's summary judgment motion*

After dismissing Cruz's failure to promote and retaliation claims, the district court granted summary judgment to Coach on Cruz's remaining claims of discriminatory termination, hostile work environment harassment, and disparate impact. We review this grant of summary judgment *de novo. See Distasio v. Perkin Elmer Corp., 157 F.3d 55, 61 (2d Cir. 1998)*. In deciding whether summary judgment was appropriate, we must draw all inferences in favor of the non-moving party, and may affirm only if the record reveals no genuine issue of material fact for trial. *See id.* Here, although we affirm the district court's grant of summary judgment with respect to the termination and disparate impact claims, we find that Cruz established a genuine factual dispute regarding her claim of hostile work environment harassment. We therefore remand the case on that basis.

A. *Termination*

Our review of Cruz's discriminatory termination [**12] claim follows the *McDonnell Douglas* burden-shifting inquiry. *See McDonnell Douglas, 411 U.S. at 802*. Under that test, Cruz must first establish a prima facie case of discrimination by demonstrating membership in a protected class, qualification for the position, adverse employment action, and circumstances giving rise to an inference of discrimination. *See id.* If she succeeds in this task, the burden shifts to Coach to produce a legitimate, non-discriminatory reason for her termination. Once Coach has done so, the burden shifts back to Cruz to show that the company's stated reason is in fact a pretext for discrimination. *See id. at 804*; *see also Austin v. Ford Models, Inc., 149 F.3d 148, 152-153 (2d Cir. 1998)* (discussing burden-shifting inquiry).

Like the district court, we assume that Cruz met her minimal burden of establishing a prima facie case of discrimination. *See Cruz*, 1998 WL 812045, at *7. The burden then shifted to Coach to articulate a legitimate, non-discriminatory reason for terminating Cruz, which Coach satisfied by pointing to its company policy prohibiting any "physical or verbal assault" [**13] on

company premises. In response, Cruz was required to produce evidence from which a jury could infer that Coach's reliance on the policy was pretextual and that its real reason for terminating her was discrimination. We find that Cruz failed to create a jury question as to pretext, and that summary judgment was therefore appropriate on this claim.

Cruz attempted to show pretext mainly by claiming that although Coach purportedly terminated her for violating the no-assault rule, similarly situated non-Hispanic employees who violated the rule were not terminated. For example, on appeal Cruz directs the Court's attention to a report she filed about her former supervisor David Otani, who, she claims, "verbally assaulted" her by telling her that she should lose weight. She also cites multiple instances of racially or sexually offensive remarks by other non-minority Coach employees. Cruz argues that these "verbal assaults" violate Coach's prohibition on "physical or verbal assaults while on company premises," and that Coach's failure to [*568] terminate the perpetrators is evidence of an enforcement policy that discriminates against Hispanic employees. She supports this claim, moreover, by noting [**14] that the three employees (other than Cruz and Heriveaux) whom Coach has terminated for fighting, pursuant to the no-assault policy, have Hispanic surnames.

Cruz's theory fails to create a jury question on pretext, however, because she has not established that she was similarly situated to the non-Hispanic employees whose violations of the policy Coach allegedly overlooked. Specifically, Cruz engaged in a physical fight, while the other employees' behavior -- offensive though it may have been -- involved words only. [3] This distinction is fatal to Cruz's discriminatory enforcement claim. Not only did Cruz fail to produce evidence that non-Hispanic employees who engaged in a physical assault escaped termination, the record reveals that Coach also terminated Heriveaux, who is not Hispanic, on the basis of the fight with Cruz. The reasonable inference, therefore, is that Coach enforced the policy against Cruz not because she is Hispanic, but because she slapped Heriveaux.

> 3 Cruz has, at best, illustrated that Coach failed fully to implement its own rule against assaults at the workplace. Nothing in Title VII, however, requires Coach to adopt or to follow such a rule in making its employment decisions. Title VII only requires that the employment decisions Coach makes be free of discrimination. In this case, Cruz has not shown that discrimination played any part in Coach's enforcement, or lack thereof, of the no-assault rule.

[**15] Cruz's argument that she acted in self-defense also fails to support her claim of pretext. First, as the district court noted, the no-assault rule contains no self-defense exception. Second, even if Cruz herself believed that she was acting in self-defense, she has produced no evidence showing that Coach believed that to be the case. She therefore has failed to demonstrate that Coach viewed the altercation as anything other than an "assault" within the meaning of the company's prohibition. Indeed, the documents and deposition testimony in the record all indicate that Human Resources personnel decided to terminate both Cruz and Heriveaux for engaging in a fight. Cruz has offered no evidence to establish that Coach's stated reliance on that policy was a pretext for race discrimination.

B. *Hostile work environment*

The district court rejected Cruz's claim of race- and gender-based hostile work environment harassment on two separate bases. First, the court found that her complaint had not pled such a claim. Second, in ruling on the merits, it found that Cruz had not adduced sufficient evidence of severe and pervasive harassment to sustain a hostile work environment charge. The court [**16] concluded that because Cruz could name only one instance on which she overheard a racial epithet, and could cite only "vague and unspecified" instances of inappropriate sexual behavior, she had not demonstrated the level of pervasive hostility necessary to support her hostile environment claim. We disagree and remand for further proceedings on this issue.

1. *The pleadings*

Turning first to the issue of Cruz's complaint, we find that although the complaint did not refer specifically to "hostile work environment harassment," it did describe the harassment Cruz experienced in enough detail to put the claim before the court. In particular, the complaint states that Human Resources Manager Rick Bloom "is notorious at Coach for his discriminatory attitudes towards minorities -- particularly Hispanics -- which he expresses by racial and ethnic slurs. Since August 1, 1995, Bloom a) has frequently referred to Hispanics as 'spics,' African Americans as 'Niggers,' and b) has stated that 'they are only capable of sweeping the floor at McDonalds' . . . ." Later in the complaint, under the heading of "Discriminatory Harassment and Violence," Cruz [*569] referred to the sexual harassment she allegedly [**17] experienced from her former co-worker David Otani: "Coach ratified and accepted Lewis', Otani's, Betts', and Heriveaux's action by their failure to act on Ms. Cruz's complaints, by not disciplining Otani for his harassment of Cruz, and by terminating Cruz's employment under the pretext of fighting in the workplace after she was physically beaten and sexually assaulted . . . ." [4]

4 We agree with the district court that, because David Otani left Coach in 1992 and Cruz did not bring her EEOC charge until May of 1996, any allegations relating to Otani's behavior alone are time-barred. We further agree that Otani's behavior is too far removed from Rick Bloom's to form the basis of a "continuing violation" claim for harassment. The continuing-violation theory extends the statute of limitations where there is "proof of specific ongoing discriminatory policies or practices, or where specific and related instances of discrimination are permitted by the employer to continue for so long as to amount to a discriminatory policy or practice." *Quinn v. Green Tree Credit Corp., 159 F.3d 759, 766 (2d Cir. 1998)* (quoting *Cornwell v. Robinson, 23 F.3d 694, 704 (2d Cir. 1994))* (internal quotation marks omitted). There is no indication in the record that Bloom and Otani acted in concert, or that their behavior was related in any way other than to be similarly offensive. That two individuals engaged in similar discriminatory behavior is not enough to demonstrate a discriminatory policy or practice. *See Quinn, 159 F.3d at 765* ("Multiple incidents of discrimination, even similar ones, that are not the result of a discriminatory policy or mechanism do not amount to a continuing violation." (citation and internal quotation marks omitted)). Nor does the record suggest that Coach knowingly allowed Otani's harassment to continue unremedied for so long as to constitute a policy or practice of harassment.

[**18] While we acknowledge that Cruz might have stated her claim of hostile work environment harassment more artfully, the essential elements of the charge do appear in the complaint. Moreover, several of the numerous discovery disputes that took place over the course of the litigation concerned Cruz's belief that she was the victim of sexual and racial harassment, thereby foreclosing any argument that the defendants lacked notice of Cruz's claim. *See, e.g.,* Plaintiff's First Set of Interrogatories, PP 5-10, 13 (requesting information about complaints of "discrimination or harassment"); Defendant's Response to Plaintiff's First Set of Interrogatories (objecting to plaintiff's requests).

The totality of the circumstances convinces us that, despite Cruz's imprecise complaint, the district court was correct in considering Cruz's hostile work environment claim on the merits. Under *Fed. R. Civ. P. 15(b)*, a district court may consider claims outside claims outside those raised in the pleadings so long as doing so does not cause prejudice. *See Fed. R. Civ. P. 15(b)* ("When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated [**19] in all respects as if they had been raised by the pleadings."); *see also Jund v. Town of Hempstead, 941 F.2d 1271, 1287 (2d Cir. 1991)* (refusing to exclude claims not alleged in complaint where claims had been addressed on the merits both on summary judgment and at trial) (citing *Rule 15(b)*). In opposing a *Rule 15(b)* amendment, "a party cannot normally show that it suffered prejudice simply because of a change in its opponent's legal theory. Instead, a party's failure to plead an issue it later presented must have disadvantaged its opponent in presenting its case." *New York State Elec. & Gas Corp. v. Secretary of Labor, 88 F.3d 98, 104 (2d Cir. 1996).*

In this case, Coach failed to demonstrate any prejudice arising from the district court's consideration of Cruz's hostile work environment claim. Although Coach's counsel objected at the summary judgment hearing to Cruz's belated claim for harassment, she did not claim that Cruz's tardiness had disadvantaged Coach in any respect. Rather, she attacked Cruz's claim on the merits. In these circumstances, Cruz's failure explicitly to plead a hostile work environment claim in her Second Amended Complaint [**20] did not [*570] preclude the district court's consideration of that issue on summary judgment. [5]

5 We also note that Cruz's failure specifically to include a hostile work environment claim in her EEOC complaint does not bar our consideration of that claim on appeal. First, Cruz's allegation in her EEOC complaint of "unpermitted touching by supervisors" is sufficient to support at least her claim of sexual harassment. Second, and more importantly, Coach has waived on appeal any argument based on Cruz's EEOC charge. *See Zipes v. TWA, Inc., 455 U.S. 385, 393, 102 S. Ct. 1127, 71 L. Ed. 2d 234 (1982)* ("Filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling."). Cruz's brief before this court claims racial as well as sexual harassment, and Coach counters this claim only on the merits, without referencing Cruz's EEOC complaint. Coach therefore may not prevail here on the ground that Cruz did not raise a hostile work environment claim in her EEOC charge. *See Norton v. Sam's Club, 145 F.3d 114, 117 (2d Cir. 1998)* ("Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal.").

[**21] 2. *Evidence of a hostile working environment*

Having found no procedural obstacle to considering Cruz's hostile work environment claim, we now turn to the merits. In order to survive summary judgment on a

claim of hostile work environment harassment, a plaintiff must produce evidence that "the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment.'" *Harris v. Forklift Sys., Inc., 510 U.S. 17, 21, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993)* (quoting *Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65, 67, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1986))*. Isolated instances of harassment ordinarily do not rise to this level. *See, e.g., Kotcher v. Rosa & Sullivan Appliance Ctr., Inc., 957 F.2d 59, 62 (2d Cir. 1992)*. Rather, the plaintiff must demonstrate either that a single incident was extraordinarily severe, or that a series of incidents were "sufficiently continuous and concerted" to have altered the conditions of her working environment. *Perry v. Ethan Allen, Inc., 115 F.3d 143, 149 (2d Cir. 1997)* (quoting [**22] *Carrero v. New York City Housing Auth., 890 F.2d 569, 577 (2d Cir. 1989))* (internal quotation marks omitted).

Determining whether workplace harassment was severe or pervasive enough to be actionable depends on the totality of the circumstances. Because the crucial inquiry focuses on the nature of the workplace environment as a whole, a plaintiff who herself experiences discriminatory harassment need not be the target of other instances of hostility in order for those incidents to support her claim. *See 115 F.3d at 150-51*. Nor must offensive remarks or behavior be directed at individuals who are members of the plaintiff's own protected class. Remarks targeting members of the other minorities, for example, may contribute to the overall hostility of the working environment for a minority employee. *See Schwapp v. Town of Avon, 118 F.3d 106, 111-12 (2d Cir. 1997)* (finding that harassment of other minorities was relevant to whether a black police officer experienced a racially hostile or abusive working environment).

In this case, the record on summary judgment contains sufficient evidence of both racial and sexual harassment to create a triable question [**23] on Cruz's hostile work environment claim. Cruz's case primarily involves the behavior of Rick Bloom, a supervisor in another Coach department to whom Cruz frequently turned for assistance on various work-related matters. Regarding the racial claim, Cruz testified that beginning on her first day at Coach, Bloom repeatedly would make "loud racial comment[s]" -- including use of the word "nigger" -- during Cruz's daily trips to the mailroom. Marva Brown, another Coach employee, further testified that Bloom constantly made racially derogatory remarks, including references to [*571] "spics" and "Colored People's Time." In addition, former employee Eugene Bampoe stated in his affidavit that between 1993 and either 1995 or 1996, the period during which he was employed at Coach, he repeatedly heard Bloom use racial epithets and make remarks such as, "the only other job you [Hispanic] people can do is sweep the floors in McDonald's."

With respect to her claim of sexual harassment, Cruz testified that during her same daily trips to the mailroom, Bloom would make repeated remarks to the effect that women should be barefoot and pregnant. Furthermore, Cruz testified, Bloom would stand very close [**24] to women when talking to them and would "look[] at [them] up and down in a way that's very uncomfortable." On these occasions, Cruz testified, Bloom would move increasingly close to her, "so usually if there is a wall I end up against the wall talking to him, and what I'll do is cut the conversation short and leave." When Cruz informed Bloom that she disliked this behavior, he would either laugh or ignore her.

Viewing this evidence -- and the other instances of harassment to which Cruz and others testified -- as we must, in the light most favorable to the plaintiff, we find that Cruz has met her burden of demonstrating an atmosphere of both racial and sexual hostility. [6] Although the district court characterized Bloom's racial harassment as occurring on "only one occasion," *Cruz,* 1998 WL 812045, at *9, Cruz has adduced evidence that Bloom in fact subjected her and others to blatant racial epithets on a regular if not constant basis. From this evidence, a jury reasonably might conclude that Bloom, a Coach supervisor, created a working environment that was hostile to Cruz on the basis of her race. *Cf. Richardson v. New York State Dep't of Correctional Serv., 180 F.3d 426, 439 (2d Cir. 1999)* [**25] ("Perhaps no single act can more quickly 'alter the conditions of employment and create an abusive working environment' than the use of an unambiguously racial epithet such as 'nigger' by a supervisor in the presence of his subordinates." (quoting *Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668, 675 (7th Cir. 1993))*. Moreover, even if Cruz herself were not present or were not the target of some of Bloom's racial remarks, a jury plausibly could find that his persistently offensive conduct created an overall "hostile or abusive environment," *Harris, 510 U.S. at 21,* which exacerbated the effect of the harassment Cruz experienced individually. *Cf. Schwapp, 118 F.3d at 112* ("Whether Schwapp was aware of [harassment directed at others] during his employment, and, more significantly, whether in light of these incidents, the incidents Schwapp experienced more directly 'would reasonable be perceived, and [were] perceived, as hostile or abusive,' are factual issues that should be resolved by a trier of fact." (quoting *Harris, 510 U.S. at 22*) (alterations in original)).

6 We emphasize, however, that Cruz's hostile work environment claim rests only on evidence of this sort and does not, despite her argument to the contrary, encompass her termination pursuant to the no-assault policy. *See* Second Amended

Complaint, P 84 (charging Coach with engaging in "discriminatory harassment and violence" by, *inter alia,* "terminating Cruz's employment under the pretext of fighting in the workplace"). Nor does Cruz's hostile work environment claim affect her claim for back pay.

[**26] Similarly, we find that a reasonable jury could view the sexual harassment Cruz experienced as severe and pervasive enough to alter the conditions of her working environment. The district court apparently considered the instances of sexual harassment in this case too vague or isolated to support a hostile work environment claim. *See Cruz,* 1998 WL 812045, at *9. We find, however, that the physically threatening nature of Bloom's behavior, which repeatedly ended with him backing Cruz into the wall until she had to "cut the conversation short" in order to extricate herself, brings this case over the line separating merely offensive or boorish conduct from actionable sexual harassment. Although the record does not reveal how [*572] often Bloom engaged in this behavior, it does suggest that Cruz encountered Bloom on a daily basis. Drawing inferences in favor of the plaintiff, a reasonable jury could conclude that Bloom physically harassed Cruz regularly throughout her tenure at Coach in a manner that was hostile to her because of her sex.

Cruz's claim finds further support, moreover, in the interplay between the two forms of harassment. Given the evidence of both race-based [**27] and sex-based hostility, a jury could find that Bloom's racial harassment exacerbated the effect of his sexually threatening behavior and vice versa. *Cf. Hafford v. Seidner, 183 F.3d 506, 515 (6th Cir. 1999)* (recognizing that evidence of religious harassment could help support racial hostile work environment claim); *Hicks v. Gates Rubber Co., 833 F.2d 1406, 1416 (10th Cir. 1987)* (noting that evidence of racial harassment may help establish sexually hostile work environment). [7] Based on the evidence Cruz presented of both racial and sexual harassment, therefore, a jury reasonably could conclude that Bloom's behavior "alter[ed] the conditions of [her] employment" based on her race and/or her gender. *Harris, 510 U.S. at 21.* Accordingly, we vacate the district court's grant of summary judgment on Cruz's hostile work environment claim. [8]

7 A question remains as to whether a plaintiff may aggregate evidence of racial and sexual harassment to support a hostile work environment claim where neither charge could survive on its own. *Cf. Hicks, 833 F.2d at 1416* (finding that "in determining the pervasiveness of the harassment against a plaintiff, a trial court may aggregate evidence of racial hostility with evidence of sexual hostility"). Because we find that Cruz adduced sufficient evidence to support independent racial and sexual harassment claims, we need not reach this issue.

[**28]

8 Following the close of briefing on the summary judgment motion below, the Supreme Court clarified the standard for employer liability in sexual harassment cases. According to the recently announced rule, an employee who brings a claim for hostile work environment harassment by a supervisor is entitled to a presumption that the employer is liable for the harassment. *See Burlington Indus. v. Ellerth, 524 U.S. 742, 118 S. Ct. 2257, 2270, 141 L. Ed. 2d 633 (1998)*; *Faragher v. City of Boca Raton, 524 U.S. 775, 118 S. Ct. 2275, 2292-93, 141 L. Ed. 2d 662 (1998)*; *see also Quinn, 159 F.3d at 767* (discussing *Burlington Industries* and *Faragher* rules). The employer may rebut that presumption, however, "if it can plead and prove, as an affirmative defense, that 1) the employer exercised reasonable care to prevent and promptly correct any sexual harassment by such supervisor, and 2) the employee unreasonably failed to avail herself of any corrective or preventative opportunities provided by the employer or to avoid harm otherwise." *Id.* (citing *Burlington Indus., 118 S. Ct. at 2270*; *Faragher, 118 S. Ct. at 2292-93*).

The question of employer liability was not raised below, and was not briefed on appeal. We therefore do not address it here. On remand, however, the district court is of course free to invite further factual development regarding the employer liability issue, and to consider a renewed motion for summary judgment on this ground.

[**29] C. *Disparate impact*

The district court also granted summary judgment on Cruz's disparate impact claim, finding that her complaint "[could] not fairly be read to state such a claim." Not only was the district court correct on this ground, but even assuming that Cruz had stated a disparate impact claim, she also failed utterly to establish a prima facie case, because she never alleged that any "facially neutral" Coach policy has a disparate effect on minority employees. *See Brown, 163 F.3d at 712* (stating elements of a disparate impact case). Cruz argues that because, aside from Heriveaux, only Hispanic employees have been terminated under the no-assault rule, the rule has a disparate impact on minority employees. She further alleges, however, that this disparity is due to discriminatory enforcement of the no-assault policy, not to the disparate effect of the policy as neutrally applied. Moreover, Cruz has not alleged that a policy with a lesser disparate impact would accomplish the same goals.

Under these circumstances, she [*573] has established no basis for disparate impact liability. *See 42 U.S.C. § 2000e-2(k)(1)(A)* (stating proof [**30] required in disparate impact cases).

III. *Cruz's other claims*

Cruz raises a number of other issues on appeal, on which we generally affirm for substantially the same reasons stated by the district court. With respect to Cruz's motion for class certification, we agree with the district court that the motion was untimely and that, on the merits, Cruz failed to establish the required elements of numerosity, commonality, typicality and adequacy of representation. *See Cruz,* 1998 WL 812045, at *3-*4 (citing *Fed. R. Civ. P. 23(a)*). Her claim that the district court erred in failing to consider a proffered expert report is also unpersuasive. At the summary judgment stage, the district court has broad discretion to rule on the admissibility of expert testimony, *see Raskin v. Wyatt Co., 125 F.3d 55, 65-66 (2d Cir. 1997)*, and Cruz has not shown that the court abused its discretion in finding the report methodologically flawed.

Cruz's claim that Coach discriminated against minorities by preferring employees with the "Coach look," i.e., white and blond, also cannot survive summary judgment. Even assuming *arguendo* that Cruz established that such a [**31] policy existed, she has failed to demonstrate that this preference affected her employment in any way. She has not shown, for example, that absent the "Coach look" policy, she would have received her desired promotion, nor has she established that the policy contributed to the decision to terminate her. Accordingly, even if Coach engages in this discriminatory practice, Cruz lacks standing to challenge it. As to Cruz's motion for a default judgment based on Coach's alleged instances of delay and neglect during litigation, she has failed to show that she was prejudiced in any way by Coach's actions, and default judgment is therefore inappropriate. Finally, with respect to Cruz's many discovery challenges, we trust that the district court will reconsider its discovery rulings insofar as they affect Cruz's hostile work environment claim. [9] In all other respects, we affirm the judgment of the district court.

9 In particular, Cruz is entitled to discovery that allows her to develop the claim that the workplace atmosphere, as a whole, was hostile to women or minorities. *See supra* Part II.B.2.

[**32] **CONCLUSION**

For the foregoing reasons, we vacate the district court's decision to grant summary judgment on Cruz's claim of hostile work environment harassment and remand the case for further proceedings on that issue. In all other respects, the judgment of the district court is affirmed.

Davis v. Monsanto Chemical Co. (1988 6th Cir.) 858 F.2d 345

858 F.2d 345, *; 1988 U.S. App. LEXIS 13584, **;
47 Fair Empl. Prac. Cas. (BNA) 1825; 47 Empl. Prac. Dec. (CCH) P38,344

JESSE B. DAVIS AND RICHARD LORENCE HARRIS, Plaintiffs-Appellants, v. MONSANTO CHEMICAL COMPANY, Defendant-Appellee, TEAMSTERS LOCAL 299; et al., Defendants

No. 87-1505

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

858 F.2d 345; 1988 U.S. App. LEXIS 13584; 47 Fair Empl. Prac. Cas. (BNA) 1825; 47 Empl. Prac. Dec. (CCH) P38,344

February 11, 1988, Argued
October 4, 1988, Decided
October 4, 1988, Filed

SUBSEQUENT HISTORY: As Amended October 12, 1988. Petition for Rehearing by the Original Hearing Panel Denied December 6, 1988.

PRIOR HISTORY: [**1] On Appeal from the United States District Court for the Eastern District of Michigan.

COUNSEL: J. Michael Hill, argued, Bret A. Schnitzer, Hill & Schnitzer, P.C., Richard A. Eagal, Allen Park, Michigan, for Appellant.

John F. Burns, Suanne Tiberio Trimmer, Mary K. Kator argued, Clark, Klein & Beaumont, Detroit, Michigan, for Appellee.

JUDGES: Martin, Jones, and Norris, Circuit Judges. Alan E. Norris, Circuit Judge, concurring in part and dissenting in part. Martin, Circuit Judge, delivered the opinion of the court, in which Jones, Circuit Judge, joined. Norris, Circuit Judge, (pp. 11-12) delivered a separate opinion concurring in part and dissenting in part.

OPINION BY: MARTIN, JR.

OPINION

[*346] BOYCE F. MARTIN, JR., Circuit Judge.

Jesse B. Davis and Richard L. Harris appeal the district court's granting of summary judgment in favor of the Monsanto Chemical Company in this action alleging [*347] racial harassment in violation of Title VII of the Civil Rights Act of 1964, *42 U.S.C. § 2000e et seq.*, and Michigan's Elliott-Larsen Civil Rights Act, *Mich. Comp. Laws § 37.1201 et seq.*

During their employment with Monsanto, both Davis and Harris, black males, had disciplinary problems, largely stemming from unauthorized absences. As both men approached the termination phase of Monsanto's disciplinary process, [**2] they filed separate charges of racial discrimination with the Equal Employment Opportunity Commission. After receiving right-to-sue letters, Harris and Davis brought separate actions against Monsanto, a Monsanto supervisor named Michael Newmarker, and Teamster's Local 299. Their complaints were consolidated.

Davis and Harris essentially have two claims. First, they contend that they were subjected to disparate treatment because of their race. Second, they allege that they were subjected to a racially hostile work environment that is actionable under Title VII.

The evidence to support these claims is not substantial. Davis and Harris allege that racial slurs were used at Monsanto, but only once was a racial epithet directed at either of them by a white co-worker or used in their presence. Davis and Harris also allege that derogatory racial graffiti was written on bathroom walls. The only time this problem was reported to a supervisor, however, the graffiti was promptly painted over. Davis also alleged that a safety poster, depicting the predicament of an inept worker, was shaded to represent a black man and labeled with Davis' name. But Davis never reported the incident, and the poster [**3] was taken down shortly thereafter. When Davis did report that someone altered his time card and spat on it, Davis'

supervisor promptly posted a notice that such conduct would not be tolerated, and the conduct was not repeated. Both Davis and Harris allege that their supervisor, Newmarker, harassed them, but it is not clear that the comments they cite as evidence of his racist behavior were racially motivated.

Davis and Harris also allege that blacks were not permitted to eat with whites in the lunchroom. This situation was never reported to a supervisor, however, and two other black employees denied that blacks ate or were required to eat at a designated table. Davis and Harris offer no evidence to support their claims of car tampering, disparate disciplinary treatment, and inferior job training. They also charge that blacks and women were forced to perform unnecessary tasks, but this allegation is not substantiated and the problem was never reported.

The district court granted Monsanto's motion for summary judgment. The court concluded that the evidence in the record failed to satisfy the legal standards for maintaining a racial harassment claim under Title VII. The court also found [**4] no evidence to support Davis and Harris' disparate treatment claims. We agree with these conclusions.

In order to maintain a disparate treatment claim, Davis and Harris must produce evidence that, because of their race, they were treated less favorably than similarly-situated white employees. *International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15, 52 L. Ed. 2d 396, 97 S. Ct. 1843 (1977)*. Davis and Harris raise three claims of disparate treatment: first, that Monsanto failed to train new black employees as well as white employees were trained; second, that white employees were disciplined less harshly for absenteeism than blacks; and, third, that rules regarding sick leaves were not evenly applied.

There is no evidence in the record to support these allegations. A fellow black employee testified that whites were not trained differently than blacks, and another black employee testified that Davis received adequate training. Davis and Harris' statements to the contrary are merely conclusory allegations, and, therefore, insufficient to create a genuine issue of fact. The only evidence regarding a white employee with a poor absenteeism record establishes that he was given the same discipline [**5] as that given to Davis and Harris. [*348] Finally, Davis and Harris have cited no instance where Monsanto's disability leave verification rules were relaxed for a white employee. Therefore, the district court properly dismissed their disparate treatment claims.

We also believe that the district court's disposition of the hostile work environment claim was proper, but we reach the same result by following a different analytical route.

The first case to recognize a cause of action based upon a discriminatory work environment was *Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957, 32 L. Ed. 2d 343, 92 S. Ct. 2058 (1972)*. The *Rogers* court held that an employee of Spanish origin could establish a Title VII violation by demonstrating that her employer created "a working environment heavily charged with ethnic or racial discrimination." *Id. at 238*. Subsequently, several courts adopted this position, finding Title VII violations where an employer created or condoned a substantially discriminatory work environment, regardless of whether the complaining employee lost any tangible job benefits as a result of the discrimination. *See, e.g., Johnson v. Bunny Bread Co., 646 F.2d 1250 (8th Cir.* [**6] *1981); DeGrace v. Rumsfeld, 614 F.2d 796 (1st Cir. 1980); Gray v. Greyhound Lines, East, 178 U.S. App. D.C. 91, 545 F.2d 169 (D.C. Cir. 1976)*. This court first endorsed this development in *Erebia v. Chrysler Plastic Products Corp., 772 F.2d 1250 (6th Cir. 1985), cert. denied, 475 U.S. 1015, 89 L. Ed. 2d 311, 106 S. Ct. 1197 (1986)*.

In *Meritor Savings Bank v. Vinson, 477 U.S. 57, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1986)*, the Court affirmed the principle embodied in this "substantial body of judicial decisions." *Id., 91 L. Ed. 2d at 59*. In this case, the Court held that, "for sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of (the victim's) employment and create an abusive working environment.'" *Id. at 60 (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982))*. The Supreme Court, however, declined to promulgate a definitive rule on when employers would be liable for such an environment. Rather, the Court recommended that subsequent courts "look to agency principles for guidance in this area." *Meritor Savings Bank v. Vinson, supra, 91 L. Ed. 2d at 63*.

In its discussion of Davis and Harris' hostile work environment claim, the district court quoted at length [**7] from this circuit's first post-Vinson opinion, *Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986), cert. denied, 481 U.S. 1041, 95 L. Ed. 2d 823, 107 S. Ct. 1983 (1987)*. The district court also frequently cited this case as support for its conclusions. We believe, though, that this reliance was misplaced because *Rabidue* does not apply to racially hostile work environment claims.

In *Rabidue v. Osceola Refining Co., supra*, the plaintiff alleged that she was the victim of a sexually discriminatory work environment. In assessing this claim, this court articulated a multi-factored test. Three of the five elements, though, referred specifically to "sex" or "sexual" harassment. *Id. at 619*. This court also prefaced its standard by stating that it applies to "a Title VII offensive work environment *sexual* harassment action." *Id.* (emphasis added). Finally, after citing cases

which supported its test, this court in *Rabidue* suggested that its standard be compared with the standard in *Erebia v. Chrysler Plastics Products Corp., supra,* a case involving a racially hostile work environment claim. *Erebia* remains the controlling law for racially hostile work environment claims in this circuit. [**8] [1]

1 Some circuits apply the same legal standard for both types of hostile work environment claims, race and sex. *See, e.g., Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Walker v. Ford Motor Co., 684 F.2d 1355 (11th Cir. 1982).* We believe that the standards need not necessarily be identical. In another area of civil rights law, the Supreme Court has applied a different, intermediate level of scrutiny for classifications based upon gender, rather than the strict scrutiny used in reviewing classifications based on race, even though these two different standards emanate from the same constitutional provision. *Craig v. Boren, 429 U.S. 190, 50 L. Ed. 2d 397, 97 S. Ct. 451 (1976).* Title VII, much like the *equal protection clause*, merely expresses a general prohibition, and courts are necessarily required to supply specific legal standards to enforce the underlying congressional mandate. Therefore, the application of slightly different standards in different types of hostile work environment claims is entirely consistent with established civil rights jurisprudence.

[*349] Although the posture of the *Erebia* case was different from the posture of the case here, [2] this court in *Erebia* identified [**9] two requisite elements for a racially hostile work environment claim: "repeated slurs and management's tolerance and condonation of the situation." *Id.* We now take this opportunity to elaborate on the racially hostile work environment standard set forth for this circuit in *Erebia.*

2 In *Erebia*, this court was reviewing whether the jury verdict in favor of the plaintiff was supported by substantial evidence. Here we are asked to decide whether it was proper to grant summary judgment in favor of the defendant, which requires a somewhat different standard of review.

In order to satisfy the first requirement, "repeated slurs," the plaintiff must show that the alleged racial harassment constituted an unreasonably abusive or offensive work-related environment or adversely affected the reasonable employee's ability to perform the tasks required by the employer. In establishing the requisite adverse effect on work performance, however, the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment. The employee need only show that the harassment made it more difficult to do the job.

In more fully explaining what this court intended [**10] by the use of the phrase "repeated slurs," we have deliberately avoided using a distinction drawn by other courts. In *Gilbert v. City of Little Rock, 722 F.2d 1390 (8th Cir. 1983), cert. denied, 466 U.S. 972, 80 L. Ed. 2d 820, 104 S. Ct. 2347 (1984),* the court stated that "more than a few isolated incidents of harassment must have occurred to establish a violation of Title VII." *Id. at 1394, citing Johnson v. Bunny Bread Co., 646 F.2d 1250, 1257 (8th Cir. 1981).* The *Gilbert* court suggested that the plaintiff must prove that the alleged conduct established a "pattern of harassment." *Gilbert v. City of Little Rock, 722 F.2d at 1394.* Drawing a distinction between "isolated incidents" and a "pattern of harassment" does not advance the analysis; the plaintiff need not prove that the instances of alleged harassment were related in either time or type. Rather, all that the victim of racial harassment need show is that the alleged conduct constituted an unreasonably abusive or offensive work-related environment or adversely affected the reasonable employee's ability to do his or her job.

If the plaintiff can prove that the racially motivated conduct constituted such an environment, he or she must [**11] then show that the employer "tolerated or condoned the situation." In order to hold the employer liable for the conduct of the victim's co-workers, the plaintiff must establish that the employer knew or should have known of the alleged conduct and failed to take prompt remedial action. "An employer who has taken reasonable steps under the circumstances to correct and/or prevent racial harassment by its nonsupervisory personnel has not violated Title VII." *De Grace v. Rumsfeld, 614 F.2d 796, 805 (1st Cir. 1980).*

Applying this two-part standard to the facts of this case, we conclude that the district court was correct in granting Monsanto's summary judgment motion. While the district court's findings may not be adequate with respect to whether the alleged harassment was sufficient to constitute a racially hostile environment, the evidence in the record clearly shows that Monsanto did not tolerate the alleged harassment. Davis and Harris cite several instances of alleged racial harassment. With respect to each incident, however, Davis and Harris failed to offer any evidence that Monsanto condoned the conduct.

Rather, the record clearly shows that, when informed of a potential problem, [**12] Monsanto took quick and appropriate measures to remedy the situation. For example, when a Monsanto supervisor was told [*350] about racially derogatory graffiti in the bathroom, the graffiti was painted over the next day. Similarly, when Davis reported the problem with his time card, a Monsanto supervisor promptly posted a notice stating that such conduct was unacceptable, and the incident did not reoccur.

With respect to the remaining instances of alleged harassment, those which Davis and Harris admit were not reported to Monsanto, the record indicates that Monsanto did not know and could not have known of the problem. For example, Davis and Harris complain that blacks were forced to eat at a separate table in the lunchroom. They admit, though, that this situation was never reported to a supervisor. Moreover, because two other black employees denied that blacks ate or were required to eat at a designated table, Monsanto could not have known of the possible problem. Therefore, because Monsanto cannot be charged with actual or constructive knowledge of this alleged lunch room "freezeout," it cannot be held liable for tolerating this alleged harassment.

In its discussion of this instance of [**13] alleged harassment, however, the district court may have misunderstood the true impact of Title VII. Citing *Howard v. National Cash Register Co., 388 F. Supp. 603 (S.D. Ohio 1975)*, the district court stated that, "the elimination of 'Archie Bunker' types from the factory environment carries Title VII too far." In *Howard*, the court explained that "Archie Bunker" is "a character who is prejudiced and biased against all persons other than of his own neighborhood, religion and nationality." *Id. at 606*. The *Howard* opinion stated that such people, "within limitations, still may assert their biased view." *Id.* By emphasizing the point that an employer "is not charged by law with discharging all Archie Bunkers in its employ," *Id.*, the district court here may erroneously be encouraging the perpetuation of the status quo.

Unfortunately, this confusion may be the product of a statement included in this court's opinion in *Rabidue v. Osceola Refining Co., supra.* In *Rabidue*, this court quoted with approval a passage from the district court's opinion. This court stated that "'Title VII [was] not designed to bring about a magical transformation in the social mores of American [**14] workers.'" *Id., 805 F.2d at 621 (quoting Rabidue v. Osceola Refining Co., 584 F. Supp. 419, 430 (E.D. Mich. 1984)).*

In reading this passage, however, one should place emphasis on the word "magical," not the word "transformation." Title VII was not intended to eliminate immediately all private prejudice and biases. That law, however, did alter the dynamics of the workplace because it operates to prevent bigots from harassing their co-workers. As the Supreme Court instructed, "private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti, 466 U.S. 429, 433, 80 L. Ed. 2d 421, 104 S. Ct. 1879 (1984)*. Title VII does not impose an unreasonable or potentially unconstitutional burden on employers. "It may not always be within an employer's power to guarantee an environment free from all bigotry. He cannot change the personal beliefs of his employees; he can let it be known, however, that racial harassment will not be tolerated, and he can take all reasonable measures to enforce this policy." *DeGrace v. Rumsfeld, supra, 614 F.2d at 805*. In essence, while Title VII does not require an employer to fire all "Archie Bunkers" in its employ, the [**15] law does require that an employer take prompt action to prevent such bigots from expressing their opinions in a way that abuses or offends their co-workers. By informing people that the expression of racist or sexist attitudes in public is unacceptable, people may eventually learn that such views are undesirable in private, as well. Thus, Title VII may advance the goal of eliminating prejudices and biases in our society.

For the foregoing reasons, the district court's decision to grant summary judgment in favor of the Monsanto Chemical Company is hereby affirmed.

CONCUR BY: NORRIS (In Part)

DISSENT BY: NORRIS (In Part)

DISSENT

ALAN E. NORRIS, Circuit Judge, concurring in part and dissenting in part.

To the extent that the majority has framed the issue in this appeal as hinging upon the district court's reliance upon this [*351] court's opinion in *Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986), cert. denied, 481 U.S. 1041, 107 S. Ct. 1983, 95 L. Ed. 2d 823 (1987)*, and promulgates a standard for assessing Title VII claims for racial harassment in the work place which is inconsistent with the standard promulgated by the Supreme Court in *Meritor Savings Bank v. Vinson, 477 U.S. 57, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1986)*, I dissent. I do, however, concur in the [**16] result arrived at by the majority.

Apparently, the majority harbors a distaste for this court's opinion in *Rabidue*, a case involving sexual harassment in the work place, since pains are taken to scold the district court for looking to that opinion for guidance. But, in its fervor to distance itself from *Rabidue*, the majority would leave this circuit with different standards for measuring Title VII claims based on hostile work environments, depending upon whether they are predicated on race discrimination or sex discrimination. It is because I believe that result is at odds with the Supreme Court's opinion in *Vinson*, that I dissent.

The majority stakes its case on this court's opinion in *Erebia v. Chrysler Plastic Prod. Corp., 772 F.2d 1250 (6th Cir. 1985), cert. denied, 475 U.S. 1015, 89 L. Ed. 2d 311, 106 S. Ct. 1197 (1986)*, an opinion which predated the Supreme Court's holding in *Vinson*. In promulgating the "multi-factor test" referred to by the majority, *Rabidue* relied upon *Vinson*, and cited *Erebia* as

supporting a proposition sufficiently analogous to lend support. I cannot agree with the majority's assertion that "*Erebia* remains the controlling law for racially hostile [**17] work environment claims in this circuit," since the majority in that case was unable to anticipate *Vinson* with complete accuracy, and, understandably, the opinion is to some extent inconsistent with *Vinson*.

Vinson, when read together with the cases upon which it relies, instructs us that, in order to state a claim under Title VII for either race or sexual harassment in the work place, the conduct complained of must be sufficiently pervasive to alter the conditions of employment and create an abusive working environment, and it must be sufficiently severe and persistent to affect seriously the psychological well-being of employees. *Vinson, 477 U.S. at 65-67.*

In *Rabidue*, this court required that "the charged sexual harassment [have] the effect of unreasonably interfering with the plaintiff's work performance and creating an intimidating, hostile, or offensive working environment that affected seriously the psychological well-being of the plaintiff." *805 F.2d at 619.* Since this standard is consistent with *Vinson*, and in that opinion the Supreme Court accorded indistinguishable treatment to Title VII claims for race and sexual harassment in the work place, I am unable [**18] to agree with the majority that the district court was culpable of misplaced reliance in looking to *Rabidue* for guidance.

Because the district court was warranted in its conclusion that plaintiffs simply did not introduce evidence adequate to establish conduct sufficiently pervasive to alter their conditions of employment and create an abusive working environment, and of a sufficiently severe and persistent nature to affect seriously their psychological well-being, I would affirm the court's disposition of the hostile work environment claim on that basis, as well as upon the plaintiffs' failure to satisfy the appropriate standard of proof for *respondeat superior* liability.

Doe v. Starbucks, Inc. (2009 C.D. Cal.) 2009 U.S. Dist. LEXIS 118878

JANE MK DOE, Plaintiff, v. STARBUCKS, INC.; TIMOTHY HORTON, Defendants.

CASE NO. SACV 08-0582 AG (CWx)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

2009 U.S. Dist. LEXIS 118878; 108 Fair Empl. Prac. Cas. (BNA) 153

December 18, 2009, Decided
December 18, 2009, Filed

COUNSEL: [*1] For Jane MK Doe, an individual, Plaintiff: John C Manly, Vince William Finaldi, LEAD ATTORNEYS, Manly and Stewart, Newport Beach, CA; Sharyl Bilas Garza, LEAD ATTORNEY, Sharyl Bilas Garza Law Offices, Newport Beach, CA.

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JUDGES: Andrew J. Guilford, United States District Judge.

OPINION BY: Andrew J. Guilford

OPINION

ORDER GRANTING IN PART AND DENYING IN PART MOTIONS FOR SUMMARY JUDGMENT

In this case, an adult supervisor had a [*2] sexual relationship with a minor under his supervision while they were both employed by Defendant Starbucks, Inc. ("Starbucks"). Starbucks filed a Motion for Summary Judgment ("Starbucks's Motion"). Defendant Timothy Horton ("Horton"), who was Plaintiff's supervisor, also filed a Motion for Summary Judgment ("Horton's Motion"). After considering the papers and arguments submitted, the Court GRANTS IN PART and DENIES IN PART Starbucks's Motion and GRANTS IN PART and DENIES IN PART Horton's Motion.

PRELIMINARY MATTERS

1. EVIDENTIARY OBJECTIONS

The parties assert numerous evidentiary objections. Resolution of some of these objections will impact the factual background of Starbucks's Motion and Horton's Motion. Thus, the Court will address important objections at the outset.

But the Court recognizes that many of the parties' objections concern issues that are not crucial to resolution of the motions. In motions for summary judgment with numerous objections, it is often unnecessary and impractical for a court to methodically scrutinize each objection and give a full analysis of each argument raised. This is especially true when many of the objections are boilerplate recitations of evidentiary [*3] principles or blanket objections without analysis applied to specific items of evidence. Thus, the Court will address only objections to evidence that is central to the issues discussed in this Order.

1.1 Starbucks's Objections

Starbucks objects to paragraph 10 of Plaintiff's Statement of Material Facts ("PSMF"), which states that

"Horton was 24-years-old when 16-year-old Doe began working [at Starbucks]; they worked together often." Starbucks contends that "Plaintiff's and Horton's ages, and the fact that they often worked together at the Starbucks store are [not] material to any issues relevant to Starbucks['s] motion." (Starbucks's Response to Plaintiff's Statement of Material Facts P 10.) This objection is OVERRULED. For reasons that will become clear, the age discrepancy between Plaintiff and Horton is relevant to many issues in this case.

Starbucks also objects to Plaintiff's statement that, "[m]y supervisor at Starbucks, Timothy Horton, began asking me out in late 2005. He would ask me out while we were working at Starbucks, in the store and on the patio, while working and while on breaks. I told Horton that I did not want to go out with him because he was too old for me and I [*4] did not want to see him . . . . Tim Horton persisted asking me out during work hours, and I finally said 'yes,' hoping it would make him stop -- I agreed to meet him at the gym to work out." (Doe Decl. P 4.) Starbucks objects to this statement "on the ground that it contradicts Plaintiff's prior deposition testimony" where she "said nothing about harassing requests to go out with him" and "testified that she wanted to have sex with him." (Starbucks's Objections to Plaintiff's Evidence ("Starbucks's Objs.") 4:22-5:5.) This objection is OVERRULED.

Ninth Circuit law does not support sustaining Starbucks's objection. "[A] party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony." *Kennedy v. Allied Mut. Ins. Co., 952 F.2d 262, 266 (9th Cir. 1991)*. But plaintiffs may freely augment and explain their deposition testimony with facts that were not previously discussed. *See Messick v. Horizon Indus., Inc., 62 F.3d 1227, 1231 (9th Cir. 1995)*.

The portion of Plaintiff's Declaration under objection is not inconsistent with her deposition testimony. *See Kennedy, 952 F.2d at 266-67*. Plaintiff's testimony that she at some point wanted to have sex with Horton [*5] does not establish that she *always* wanted to have sex with him. The record shows that Plaintiff began working with Horton in July 2005, but did not engage in sexual activity with him until November or December 2005. Even though Plaintiff later said that she wanted to have sex with Horton, she was a minor who was susceptible to manipulation and coercion. It is possible that Plaintiff's stated desire to have sex with Horton was the product of his coercive conduct. Accordingly, Plaintiff's statements in her declaration that she initially rejected Horton's requests do not contradict her earlier deposition testimony.

Starbucks next objects to paragraph 17 of the Doe Declaration, where Plaintiff states that, "in the store while we were working, and on the patio while we were working, in front of [coworkers]," Horton made numerous, "perhaps hundreds," of explicit and often profane expressions of his desire to engage in sexual activity with her. (Starbucks's Objs. 9:9-10:8.) Starbucks argues that paragraph 17 contradicts Plaintiff's deposition testimony where she "testified about two sexually explicit comments that Horton made to her while they were working at the Irvine Starbucks, and specifically [*6] stated that she could not recall any others." (Starbucks's Objs. 9:27-10:1.) This objection is OVERRULED concerning all of paragraph 17 except Plaintiff's statement that Horton said "I like to f*** sixteen year olds" while he and Plaintiff "were on the patio, surrounded by approximately four Starbucks employees." (Doe Decl. P 17.)

Though Plaintiff testified that she could not recall any sexually explicit comments by Horton other than the ones she identified during her deposition, it is possible that Plaintiff merely forgot similar statements that were made, and later recalled those statements after she had more time to reflect. But Plaintiff's assertion that Horton said "I like to f*** sixteen year olds" in front of coworkers is different than the other statements alleged in paragraph 17. This statement should have been particularly memorable to Plaintiff. It is the only statement that would explicitly identify Horton's desire to have sex with minors. Further, Plaintiff claims that it was made in front of coworkers, which contradicts her testimony that she and Horton concealed their relationship from their coworkers. Thus, the Court SUSTAINS the objection to the statement in paragraph [*7] 17 that Horton said "I like to f*** sixteen year olds" in front of coworkers.

Starbucks also objects to Paragraph 20 of the Doe Declaration, which states that Horton "demanded that I perform oral sex on him, which I did. I felt like I had to -- that I had no choice. . . . I felt that, because he had given me marijuana and I had smoked it with him, I had to do what he said, because he was my Supervisor and I didn't want to lose my job." (Doe Decl. P 20.) Starbucks argues that "Plaintiff's assertion that she felt coerced to have oral sex with Horton because she feared losing her job is conclusory and not supported by any evidence." (Starbucks's Objs. 12:26-28.) This objection is OVERRULED. Plaintiff's statement is not conclusory. It is a factual assertion that it is not contradicted by Plaintiff's deposition testimony. Starbucks contends that, "[t]o survive summary judgment in a sexual harassment case, a plaintiff 'must present more than conclusory allegations that the supervisor proposed a sexual liaison and the employee responded to the overtures in order to protect her employment interests.'" (Starbucks's Objs. 12:28-13:4 (quoting *Holly D. v. Cal. Institute of Tech., 339 F.3d 1158, 1174 (9th Cir. 2003)).*) [*8] But Plaintiff provides more than a conclusory allegation here, so her statement is admissible.

Finally, Starbucks objects to the statements of Adam

Cohen ("Cohen"), an assistant manager who worked with Plaintiff and Horton, that he had "solid evidence" a month to six weeks before Plaintiff left the store that something "very extracurricular" was going on between her and Horton. (Starbucks's Response to Plaintiff's Statement of Material Facts P 46.) Cohen's statements come from a police report that was recorded by a police officer. Starbucks argues, among other things, that "the testimony . . . is inadmissible hearsay evidence for which there is no exception." The Court agrees with Starbucks's hearsay argument and SUSTAINS this objection concerning Cohen's statements in the police report. *See Colvin v. U.S., 479 F.2d 998, 1003 (9th Cir. 1973)* ("Entries in a police report based on an officer's observation and knowledge may be admitted, but statements attributed to other persons are clearly hearsay. . . .").

1.2 Horton's Objections

Horton objects to the statement in Plaintiff's declaration that she was "being pursued by Horton against her protestations." (Horton Reply 6:12-13.) He argues [*9] that "Plaintiff painted the exact opposite picture in" a letter where she wrote that they kissed at the gym, and that after "the kiss at the gym, she would try to see him every chance that [she] got." (Stoner Decl. Ex. 2.) According to Horton, "[i]t must be concluded when juxtaposing Plaintiff's declaration with [this] letter, that the . . . declaration is a sham." (Horton Reply 6:15-16.) This objection is OVERRULED. The sham affidavit rule does not apply where the party's declaration contradicts prior *unsworn* words. *See Leslie v. Grupo ICA, 198 F.3d 1152, 1158 (9th Cir. 1999)*; *Shockley v. City of Newport News, 997 F.2d 18, 23 (4th Cir. 1993)*. Here, Plaintiff's letter was not sworn testimony. Thus, the fact that Plaintiff's later statements contradict the letter does not make the later statements inadmissible.

Horton also makes similar objections to other parts of the Doe Declaration that he contends are contradicted by Plaintiff's earlier written letters. Since none of the letters were sworn statements, these objections are likewise OVERRULED.

2. REQUEST FOR JUDICIAL NOTICE

In support of Horton's Motion, Horton requests that the Court take judicial notice of four documents: (1) *Alabama Code § 13A-6-70*; [*10] (2) *Utah Code 76-5-401*; (3) the statutory references and associated state laws referenced in the article: "Statutory Rape: A Guide to State Laws and Reporting Requirements by the Lewin Group"; and (4) *California Penal Code Section 261.5*. Under *Federal Rule of Evidence 201*, "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Fed. R. Evid. 201*. Facts subject to judicial notice may be considered on a motion to dismiss. *Mullis v. U.S. Bankr. Ct., 828 F.2d 1385, 1388 (9th Cir. 1987)*. Without addressing whether it is necessary to request judicial notice of state statutes, the Court finds that the documents at issue meet the requirements of *Rule 201*, and Horton's request for judicial notice is GRANTED.

BACKGROUND

The following facts are taken from evidence submitted by the parties. In this summary judgment, these facts are viewed in the light most favorable to Plaintiff, and some of these facts are disputed. Further, the Court omitted some evidence offered [*11] by Defendants that might be relevant at trial but does not impact resolution of Defendants' motions. Thus, the following facts are not necessarily true and do not establish that Plaintiff will succeed on her claims that ultimately proceed to trial.

1. PLAINTIFF AND HORTON

Plaintiff was 16 when she was hired by Starbucks in July 2005. (Starbucks's Statement of Undisputed Facts ("SSUF") P 1.) Horton was 24. (Plaintiff's Statement of Material Facts ("PSMF") P 10.) They often worked together. (PSMF P 10.)

The parties disagree about what happened between July 2005 and late 2005. According to Plaintiff, Horton repeatedly asked her "to go out with him." (Doe Decl. P 4.) She says she initially resisted. (Doe Decl. P 4.) In Plaintiff's words, "Horton persisted asking me out during work hours, and I finally said 'yes,' [in late 2005] hoping it would make him stop -- I agreed to meet him at the gym to work out." (Doe Decl. P 4.)

What started as a date to the gym developed into a sexual relationship. The day after the gym, Plaintiff met Horton at Starbucks "and he walked [her] out to his car in the . . . parking lot." (Doe Decl. P 20.) Plaintiff says: "He gave me some marijuana, and we both smoked [*12] marijuana in his car. Then he demanded that I perform oral sex on him, which I did. I felt like I had to -- that I had no choice. . . . I felt that, because he had given me marijuana and I had smoked it with him, I had to do what he said, because he was my Supervisor and I didn't want to lose my job." (Doe Decl. P 20.)

Plaintiff and Horton had many other sexual encounters. They "engaged in . . . vaginal intercourse and oral copulation . . . almost daily, lasting through June 2006." (PSMF P 25.) They exchanged explicit, sexual comments and text message at work. (PSMF P 20.) They "smoked marijuana and had sex in his car" in the parking lot by Starbucks during work breaks. (PSMF P 25.) They also had sex in houses and hotels. (PSMF P 26.) Horton told Plaintiff not to tell anyone about their sexual

relationship. (PSMF P 31.)

2. THE RESPONSE OF OTHER STARBUCKS EMPLOYEES

Other Starbucks employees regularly saw Plaintiff and Horton together. Lina Nobel, the store manager, suspected that they were "doing more than just hanging out." (Nobel Depo. 124:7-11.) Nobel discussed with Starbucks's human resources director Sarah Kelly ("Kelly") the possibility that Plaintiff was dating Horton, but no investigation [*13] occurred at that time. (Nobel Depo. 89:13-15.) An assistant manager, Kari Marsh, reminded Horton about Starbucks's dating policy and warned him that he could not date Plaintiff. (SSUF PP 22, 24, 29-31.) Horton said he understood this policy, and he denied dating Plaintiff. (Nobel Depo. 64:21-65:3.) Marsh "warned him that, if he was lying, it would be grounds for termination." (Starbucks's Reply 20:13-18; SSUF PP 29-31.) Also, a shift leader named Candice confronted Plaintiff about her contact with Horton outside of work, and Plaintiff did not deny it. (Doe Depo. 277:12-17.) Horton later "yelled at" Plaintiff for this exchange with Candice, (Doe Depo. 277:18-20), and Horton and Plaintiff denied that they were dating when confronted by others at Starbucks, (Marsh Depo. 166:16-167:20).

In February 2006, Plaintiff told her mother about her sexual relationship with Horton. (PSMF P 35.) Her mother "informed Starbucks Management of the sexual activity between Horton and Doe, asking that they investigate and take steps to prevent it, protecting her daughter." (PSMF P 37.) Nobel agreed "to make sure that [Plaintiff and Horton would] not have any contact until . . . she completed her investigation [*14] . . . ." (JM Depo. 158:10-15.)

Nobel then made some inquiries concerning the statements of Plaintiff and her mother. When she confronted Plaintiff about the situation, Plaintiff admitted she was having a sexual relationship with Horton. (PSMF P 39.) While Horton still denied dating Plaintiff, Nobel did not ask Horton "whether he had had any type of sexual contact with [Plaintiff]," because she thought it was not her place to do so. (Nobel Depo. 65:4-8.) She did not make any credibility determination because she believed it was not her role to "pass judgment." (Nobel Depo. 65:13-66:3.) She initially did not believe that Starbucks's sexual harassment policy applied to Plaintiff's situation with Horton because, in her view, "there was no accusation that there was harassment." (Nobel Depo. 71:15-18.) To Nobel's knowledge, there was never "a determination made [by Starbucks] as to whether there was sexual contact between [Plaintiff] and [Horton]." (Nobel Depo. 81:5-8.) Starbucks did not formally investigate the relationship between Horton and Plaintiff. (Kelly Depo 91:2.)

3. AFTER FEBRUARY 2006

Nobel later told Plaintiff's mother that she spoke to Horton and "he denied any wrongdoing with [*15] [Plaintiff], . . . and if she fired him or terminated him, she was afraid that she was going to have a wrongful termination claim on her hands." (JM Depo. 187:18-24.) Plaintiff asked to be transferred to a different Starbucks store because she "felt like she had to." (PSMF P 40.) So Plaintiff was transferred. (PSMF P 40.) Nonetheless, Plaintiff and Horton continued seeing each other, though the frequency of their encounters decreased. (Doe Depo. 351:4-352:1.) On one occasion, Plaintiff told the manager at the new Starbucks store about her situation and cried to the new manager. (PSMF P 51.) Horton met with Plaintiff near the new store at least once. (Doe Depo. 348:13-17.)

Later in 2006, Plaintiff stopped working at Starbucks. (PSMF P 59.) She enrolled in a treatment facility out of state to address mental and emotional problems she was having. (PSMF P 59.)

Horton pleaded guilty to a criminal charge of unlawful sexual intercourse with a minor under 18. (PSMF P 63.)

4. THIS LAWSUIT

Based on these facts and others, Plaintiff filed this lawsuit. Her Complaint asserted several claims against both Defendants, which are numbered as follows: (1) negligence; (2) negligent supervision; (3) negligent [*16] hiring/retention; (4) negligent failure to warn, train, or educate; (5) intentional infliction of emotional distress; (6) sexual battery; (7) assault; (8) sexual harassment; (9) gender violence; (10) constructive discharge in violation of public policy; (11) unfair business practices; (12) sexual harassment -- hostile work environment; and (13) failure to take steps necessary to prevent sexual harassment. She later dismissed her claims against Horton for negligent supervision, negligent hiring and retention, negligent failure to warn, train or educate, constructive discharge, and unfair business practices.

LEGAL STANDARD

Summary judgment is appropriate only where the record, read in the light most favorable to the non-moving party, indicates that "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." *Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).* Material facts are those necessary to the proof or defense of a claim, as determined by reference to substantive law. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).* A factual issue is genuine "if

refusal of some employees to work with him. GTE notes that many of these incidents were not formally reported to "management." I need not determine whether this distinction generally makes a difference because in this case, GTE's own anti-discrimination policy specifically directs employees to discuss discrimination concerns "with *your supervisor* or human resources representative" (emphasis added). In general, employers "are liable for failing to remedy or prevent a hostile work environment of which management-level employees knew, or *in the exercise of reasonable care should have known.*" *Swenson v. Potter, 271 F.3d 1184, 1202 (9th Cir. 2001)* (emphasis in original, internal quotations omitted). Because McGinest followed GTE's own instructions for reporting discrimination, at least management reasonably "should have known" of the existence [**86] of the complaints.

Allegations involving the additional bathroom graffiti and the banner graffiti were not specifically reported by McGinest. But in each case, McGinest alleges that the offensive markings appeared in areas used by, and accessible to, supervisory employees, which GTE does not dispute. Therefore, a reasonable factfinder could conclude that GTE "in the exercise of reasonable care should have known" of the existence of the graffiti. *Id.* (emphasis omitted). This is particularly true for graffiti that appeared after McGinest filed his complaint. Thus, I would conclude [*1135] that GTE may not claim lack of notice for any of McGinest's admissible allegations.

3

There remains one additional ground upon which GTE might succeed on summary judgment. Where, as here, there is evidence suggesting that a company had sufficient notice of discriminatory conduct, it generally may avoid liability if it adequately responded to the situation. *Fuller, 47 F.3d at 1527.* This may be so whether the offending employee is a coworker or a manager, although the burdens of proof differ. *See Swinton, 270 F.3d at 803* (holding, in coworker harassment context, that plaintiff [**87] must prove "that the employer knew or should have known of the harassment but did not take adequate steps to address it"); *Nichols, 256 F.3d at 877* (holding, in supervisor harassment context, that an employer can partially defend by proving that it "exercised reasonable care to prevent and correct promptly any . . . harassing behavior"). [11] In considering adequacy, we examine a company's response in its ability to "stop harassment by the person who engaged in harassment." We must also consider whether that response might "persuade potential harassers to refrain from unlawful conduct." *Ellison v. Brady, 924 F.2d 872, 882 (9th Cir. 1991).*

11 In the supervisor context, a company must additionally demonstrate that an employee failed to take reasonable steps to pursue company remedies in order to avail itself of this defense. *See Nichols, 256 F.3d at 877.* For purposes of simplicity, however, I address only the "adequate response" question for each allegation.

[**88] In this case, GTE did formally respond to some of McGinest's complaints. And when GTE acted to address McGinest's specific allegations, discriminatory conduct from that particular employee appears to have ceased. For example, when GTE eventually learned the identity of a witness to Hughes's comments, it immediately reprimanded him, and there are no further allegations of misconduct against him. Likewise, when GTE spoke to DeLeon about the nicknames he used, DeLeon, too, ceased the offensive conduct. Finally, when McGinest complained to management about the bathroom graffiti, GTE promptly removed it.

Taken individually, GTE's responses might perhaps appear reasonable. [12] Indeed, there is no question that they worked to cease any additional actionable conduct by the offending employee. Nevertheless, despite GTE's efforts, opprobrious comments and behavior continued with some regularity from 1995 through 2000. And considering the totality of the circumstances, as we must, a reasonable factfinder could conclude that GTE's corrective measures were inadequate for failing "to impose sufficient penalties to assure a workplace free from . . . harassment." *Id.* [*1136] In other words, the totality [**89] of the circumstances may suggest that the discriminatory conduct still occurred with sufficient frequency and severity such that GTE's remedies did not reasonably "persuade potential harassers to refrain from unlawful conduct." *Id.* This precludes summary judgment for GTE on these grounds. *Harris, 510 U.S. at 23.*

12 One might dispute whether the two-year gap between Hughes's comments and GTE's response was reasonable. However, Hughes absolutely denied making any racist comments at all, and GTE was not provided with any witnesses to the event. And as soon as it learned the identity of a witness, GTE immediately acted to reprimand Hughes. *See, e.g., Holly D., 339 F.3d at 1178* (finding an adequate remedial measure where the defendant immediately responded to a harassment claim after a delay caused, in part, because the plaintiff "declined to provide [evidence] to the investigating committee"). Moreover, in the intervening period, there were no further specific allegations of discriminatory conduct by Hughes. Thus, when viewed within the confines of Hughes's conduct alone, GTE's response to the incident appears reasonable. I would note, however, that one of GTE's remedial requirements, that Hughes watch a tape

concerning *sexual* harassment, seems quite puzzling.

[**90] C

Ultimately, my review of McGinest's admissible evidence, considering the totality of the circumstances, reveals a "close case" indeed. GTE made efforts to respond to McGinest's complaints, after which no one particular aggressor continued harassing McGinest. But considering the claim as a whole, McGinest's allegations present evidence of an overall work environment that may have been sufficiently hostile to trigger Title VII's protections.

Because I believe that we must exclude some of McGinest's allegations either as time barred or as merely conclusory, I am regrettably unable to concur in the majority's analysis. While I do agree that McGinest's claims may go forward, I must nonetheless dissent from the majority's unwillingness properly to examine the scope of that inquiry. The majority's opinion sets a dangerous precedent whereby plaintiffs who present a kitchen sink's worth of unsupported and time-barred allegations can survive summary judgment because "taken all together" they somehow mesh with each other so as to deny an employer's efforts to avoid liability without a trial. Nevertheless, even upon a more soundly based analysis, triable issues of material fact remain in [**91] this case, and I therefore concur in the majority's decision to reverse the district court's summary judgment dismissal of the hostile work environment claim. .

II

McGinest also claims that GTE failed to promote him to the position of Outside Plant Construction Installer Supervisor on account of his race, a Title VII disparate treatment claim. *See 42 U.S.C. § 2000e-2(a)*; *Jauregui v. City of Glendale, 852 F.2d 1128, 1134 (9th Cir. 1998)* (describing disparate treatment as being "singled out and treated less favorably than others similarly situated on account of race" (internal quotation omitted)).

In support of this claim, McGinest invoked the familiar *McDonnell Douglas* presumption. *See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973)*. I agree with the majority that the litigants appear somewhat confused about the use of the *McDonnell Douglas* presumption and how it relates to other evidence of discrimination. And because these burden-shifting issues are somewhat complicated, like the majority, I, too, engage in a complete analysis of the issue, but reach a different conclusion. [13]

13 I must admit that I find the majority's analysis somewhat confusing as well. It suggests that the method of analysis is "not particularly significant." Maj. Op. at 3036. To the extent the majority suggests that the *McDonnell Douglas* presumption does not provide McGinest with a significant advantage in this context, I disagree. Successful invocation of the presumption, and a subsequent failure of an employer to proffer an adequate, nondiscriminatory explanation, allows a plaintiff to go to trial on less evidence than he or she otherwise could--which is why it is termed a "presumption." But to the extent the majority takes note of GTE's non-discriminatory explanation and thus recognizes that the *McDonnell Douglas* presumption no longer attaches, I agree with the majority that issues pertaining specifically to the presumption then become "not particularly significant." *Id.*

[**92] [*1137] A

There is no question that McGinest is a member of a protected class, that he applied to and was qualified for the supervisor position, and that he was rejected from that position. GTE disputes whether McGinest satisfied the fourth factor, "that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *Id. at 802*. For, while a white supervisor received the job, GTE claims that because it was only a lateral transfer, the supervisor was not "treated more favorably." *Chuang v. Univ. of Cal., Davis Bd. of Trustees, 225 F.3d 1115, 1123 (9th Cir. 2001)*.

GTE takes an overly literal approach to the question. The Supreme Court in *McDonnell Douglas* itself indicated that the test must be practically applied. *McDonnell Douglas, 411 U.S. at 802 n.13*. And here, GTE does not contest that McGinest qualified for a favorable promotion, and that the same job went to a white candidate instead. Therefore, I agree that McGinest successfully invoked the presumption.

GTE may rebut, however, by setting forth "some legitimate, nondiscriminatory reason for the challenged [**93] action." *Chuang, 225 F.3d at 1123-24*. GTE presented evidence that a "salary/hiring freeze" was in effect at the time, prohibiting outside hiring and internal promotions accompanied by increased pay. Salary and hiring freezes, of course, are common in the business world. On its face, then, this is a legitimate, nondiscriminatory reason for failing to promote McGinest. *See* Maj. Op. at 3036 (concluding that McGinest "must counter GTE's explanation that a hiring freeze accounted for its failure to promote him"); *see also, e.g., Jones v. Fla. Power Corp., 825 F.2d 1488, 1492 (11th Cir. 1987)* (upholding factual finding that plaintiff's job denial "was not the result of racial discrimination but was justified due to a company hiring freeze"). Consequently, we are presented with an explanation that is "legally sufficient to justify a

judgment for the defendant," *Tex. Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 255, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981)*, so the *McDonnell Douglas* "presumption of discrimination drops out of the picture." *Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000)* (internal [**94] quotation omitted). .

B

In the absence of the *McDonnell Douglas* presumption, McGinest's "burden now merges with the ultimate burden of persuading the court that []he has been the victim of intentional discrimination. He may succeed in this either [(1)] directly by persuading the court that a discriminatory reason more likely motivated the employer or [(2)] indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine, 450 U.S. at 256*. As to the first method, the majority correctly concludes that McGinest may present either direct or circumstantial evidence of discrimination, so long as it is sufficient to satisfy his ultimate burden. *See Desert Palace, Inc. v. Costa, 539 U.S. 90, 156 L. Ed. 2d 84, 123 S. Ct. 2148 (2003)*.

1

McGinest offers two pieces of evidence directly to prove discrimination. [14] First, [*1138] he points to the offensive comments and other evidence that make up his hostile work environment claim. The majority specifically relies on this evidence--or at least on GTE's "permissive" response to it--to conclude that McGinest meets his burden. However, Ninth Circuit cases involving discriminatory failure to promote [**95] have always involved evidence of discrimination *among decisionmakers*. *See, e.g., Lam v. University of Hawaii, 40 F.3d 1551 (9th Cir. 1994)* (finding evidence that professor who headed appointments committee was biased). Indeed, in the absence of additional evidence, "statements by nondecisionmakers, nor statements by decisionmakers unrelated to the decisional process itself, [cannot alone] suffice to satisfy the plaintiff's burden in this regard." *Price Waterhouse v. Hopkins, 490 U.S. 228, 277, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989)* (O'Connor, J., concurring); *see, e.g., DeHorney v. Bank of Am. Nat'l Trust & Sav. Ass'n, 879 F.2d 459, 467 (9th Cir. 1989)* (holding that the plaintiff failed to make out a prima facie case of race discrimination when there was no evidence to establish a nexus between the subordinate's racial slur and the superior's decision to terminate).

14 McGinest actually suggests a third as well: that he was passed over for four other management positions in the past. However, he did not make this allegation before the district court, and there is no evidence in the record to support it. I therefore do not consider it.

[**96] Here, the immediate decisionmaker, Begg, actually *recommended* hiring McGinest, and there are no allegations that he engaged in any discriminatory conduct either before, during, or after he declined to hire him. The salary/hiring freeze decision itself came from upper management, and evidence of harassment among co workers and supervisors at McGinest's yard simply does not establish discrimination extending to those higher levels. *See DeHorney, 879 F.2d at 467*. Neither has McGinest produced any other evidence connecting these decisionmakers to the discriminatory conduct of Hughes, Led-better, and others, nor has he suggested that GTE's upper management intended to discriminate against him by instituting the freeze. There may be a triable issue of fact as to whether GTE's responses to the allegedly hostile work environment were insufficient for purposes of summary judgment. But this does nothing to establish that GTE upper management had any discriminatory *motive* for failing to promote McGinest.

Indeed, the evidence suggests the contrary in this case. GTE management responded to--and remedied--each individual instance of discrimination of which it formally [**97] became aware, including Hughes's comments, DeLeon's comments, and even Noson's behavior. While these responses may have been insufficient to rebut an overall hostile work environment claim, they certainly do not suggest that GTE management acted with any kind of discriminatory intent. Therefore, unlike the majority, I do not believe that McGinest may rely on his admissible evidence of a hostile work environment to bootstrap his disparate treatment claim.

Both McGinest and the majority also rely on evidence that GTE may have employed a disproportionately small number of African Americans. The majority accepts this allegation. Maj. Op. at 3037. But I, respectfully, cannot. First, there is no such statistical evidence in the record, even though McGinest presumably had an opportunity to develop it during discovery. Indeed, the district court denied McGinest's request at summary judgment to take judicial notice of such information. This ruling was clearly correct, as the information was both reasonably disputed by GTE and was not readily verifiable. *Fed. R. Evid. 201(b)*. The district court further concluded that McGinest's statistics [*1139] were irrelevant because [**98] they were not accompanied by any analysis and because they involved a *different county* than where he actually worked. Such an evidentiary ruling is reviewed for abuse of discretion, of which I find none. *See Domingo v. T.K., 289 F.3d 600, 605 (9th Cir. 2002)* (noting limited review "even when the rulings determine the outcome of a motion for summary judgment").

Moreover, this kind of data would shed little light on McGinest's disparate *treatment* claim because it says

next to nothing about whether GTE used its neutrally applicable salary/hiring freeze in an effort to discriminate against him. Rather, it is more properly understood as evidence of disparate *impact*, tending to show that the effects of GTE's employment practice fell more harshly on him. *See Raytheon Co. v. Hernandez, 540 U.S. 44, 157 L. Ed. 2d 357, 124 S. Ct. 513, 519 (2003)* ("This Court has consistently recognized a distinction between claims of discrimination based on disparate treatment and claims of discrimination based on disparate impact.").

Unfortunately, McGinest raised the issue of disparate impact for the first time on summary judgment, when he asked the court to take judicial [**99] notice of the statistics. Because McGinest failed to "plead the additional disparate impact theory in [his] complaint[], or . . . to make known during discovery [his] intention to pursue recovery on the disparate impact theory," he may not now rely on it. *Coleman v. Quaker Oats Co., 232 F.3d 1271, 1294 (9th Cir. 2001)*. In light of this failure, and because GTE has "offered a legitimate, non-discriminatory reason for its actions so as to demonstrate that its actions were not motivated by [McGinest's race]," consideration of this evidence would require us to "stray[] from [our] task by considering not only discriminatory intent but also discriminatory impact." *Raytheon, 124 S. Ct. at 521*. This, the Supreme Court has told us we cannot do. *See id.*

2

Alternatively, McGinest attempts to meet his burden "indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine, 450 U.S. at 256*. McGinest first asks us to take judicial notice of reports of GTE's financial health around the time of the salary/hiring freeze. I agree with the majority that we must deny this motion, as these reports are [**100] not "capable of accurate and ready determination" as required by *Fed. R. Evid. 201(b)*. [15]

> 15 Moreover, such evidence would be inherently ambiguous in this context. Perhaps GTE's profit that year suggests that a salary/hiring freeze was unnecessary, and was instead a made-up justification for failing to promote McGinest. On the other hand, perhaps GTE made a profit that year precisely because it was fiscally conservative by, among other things, instituting a salary/hiring freeze.

McGinest is then left with a simple attack on the credibility of GTE's witnesses, arguing that the lack of *documentary* evidence of a freeze suggests that its explanation is "unworthy of credence." *Burdine, 450 U.S. at 256*. In reversing the district court, the majority, too, relies heavily on "the absence of any documentation confirming that a hiring freeze was in place during the relevant time period." Maj. Op. at 3036.

This, of course, is not even evidence at all. *See Saint Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 519, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993)* [**101] ("It is not enough, in other words, to *dis*believe the employer . . . ." (emphasis in original)). Rather, it is simply an attack on the *form* of the admissible evidence GTE submitted. It is [*1140] axiomatic that adjudicators "must follow the same rules regarding documentary evidence as [those] regarding testimonial evidence." *Zahedi v. INS, 222 F.3d 1157, 1165 (9th Cir. 2000)*; *see also, e.g., Vera-Villegas v. INS, 330 F.3d 1222, 1233 (9th Cir. 2003)* (holding that "documentary evidence is judged by the same credibility standards that apply to testimonial evidence"). [16]

> 16 Both of these cases happen to concern treatment of evidence by Immigration Judges. I would assert as indisputable that the same principles apply when *any* judge, including an appellate judge, examines evidence.

But the majority appears somehow to have transformed its disparagement of *GTE's* testimonial evidence into *McGinest's* "proof" that is sufficient to carry his burden of persuasion. *See* [**102] Maj. Op. at 3037 (describing the testimonial nature of GTE's evidence as "proof" that the defendant's explanation is unworthy of credence" (internal quotation omitted)). This may be a neat trick, but it is directly contrary to Supreme Court precedent, for it clearly "disregards the fundamental principle . . . that a presumption does not shift the burden of proof, and ignores [the Supreme Court's] repeated admonition that the Title VII plaintiff at all times bears the ultimate burden of persuasion." *Hicks, 509 U.S. at 511* (internal quotation omitted).

Indeed, the majority's rejection of GTE's explanation can only be described as an independent credibility determination. [17] But again, direct Supreme Court authority stands in the way. Because GTE's burden of submitting a neutral hiring justification "is one of production, not persuasion[,] it 'can involve no credibility assessment.' " *Reeves, 530 U.S. at 142* (quoting *Hicks, 509 U.S. at 509*). Neither McGinest nor the majority may simply cast aspersions on GTE's non-discriminatory explanation. *Id.* Rather, McGinest must present *evidence* that it is untrue, and this he has [**103] not done.

> 17 With respect, I am particularly surprised that the majority would weigh the credibility of GTE's hiring-justification evidence in light of its own admonition that a "court is not empowered to make credibility determinations" at summary judgment. Maj. Op. at 3019 n.5.

Even if an examination of GTE's "trustworthiness" were proper, I would find no fault. Two GTE employees, Begg and Nakamura, testified that they had direct knowledge of the freeze, while two other employees,

Brand and Valle, were familiar with it. Corroborating this testimony is the undisputed fact that the man hired in McGinest's place did *not* receive a promotion or a pay increase. McGinest was unwilling or unable even to produce evidence, circumstantial or otherwise, that GTE hired or promoted anyone else during the relevant time period.

3

Once the *McDonnell Douglas* presumption vanished in the face of GTE's neutral hiring justification, McGinest failed to produce any admissible, relevant evidence of a discriminatory failure [**104] to promote him. Neither did he present any *evidence* suggesting that GTE's neutral explanation was "unworthy of credence." *Burdine, 450 U.S. at 256*. Therefore, I must respectfully dissent from the majority's decision to reverse the district court's dismissal of this claim.

III

Finally, McGinest also brings suit for retaliatory failure to promote. *See 42 U.S.C. § 2000e-3(a)* ("It shall be an unlawful employment practice for an employer [*1141] to discriminate against any of [its] employees . . . because he has opposed any [discriminatory] practice."). I agree with the majority's reasoning and conclusion that we must uphold the district court's dismissal of this claim.

IV

In conclusion, I agree that we must reverse on the hostile work environment claim, but for reasons different from the majority. I respectfully disagree with the majority on the disparate treatment claim, and would affirm. Finally, I concur in the court's decision to affirm summary judgment dismissal on the retaliatory failure to promote claim.

Meritor Savings Bank, FSB v. Vinson (1986) 477 U.S. 57

477 U.S. 57, *; 106 S. Ct. 2399, **;
91 L. Ed. 2d 49, ***; 1986 U.S. LEXIS 108

MERITOR SAVINGS BANK, FSB v. VINSON ET AL.

No. 84-1979

SUPREME COURT OF THE UNITED STATES

477 U.S. 57; 106 S. Ct. 2399; 91 L. Ed. 2d 49; 1986 U.S. LEXIS 108; 54 U.S.L.W. 4703; 40 Fair Empl. Prac. Cas. (BNA) 1822; 40 Empl. Prac. Dec. (CCH) P36,159

March 25, 1986, Argued
June 19, 1986, Decided

PRIOR HISTORY: CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

DISPOSITION: *243 U. S. App. D. C. 323, 753 F.2d 141*, affirmed and remanded.

DECISION:

Sexual harassment creating hostile or abusive work environment, without economic loss, held to violate Title VII of Civil Rights Act of 1964 (42 USCS 2000e-2000e-17).

SUMMARY:

A female bank employee was allegedly subjected to sexual harassment by her male supervisor, including (1) public fondling, and (2) sexual demands, to which she allegedly submitted out of fear that she would otherwise lose her job. She filed suit against the supervisor and the bank in the United States District Court for the District of Columbia after she was terminated, claiming that the supervisor's conduct had violated her rights under Title VII of Civil Rights Act of 1964 (42 USCS 2000e-2000e-17). The supervisor denied that he had had any sexual relationship with the employee. The District Court rendered judgment in favor of the supervisor and the bank without resolving that factual issue, holding (1) that the employee had not made out a case of sexual discrimination because any relationship that might have existed had been voluntary and had never been made a condition of the employee's continued employment or advancement, and (2) that the bank could not be held liable for the supervisor's alleged actions because it had not received any notice about his supposed offensive conduct (*22 EPD 30708, 23 FEP Cases 37*). The United States Court of Appeals for the District of Columbia Circuit reversed and remanded, holding that an infringement of Title VII is not necessarily dependent upon the victim's loss of employment or promotion, that the voluntariness of the alleged sexual relationship was immaterial, and that an employer is liable for sexual harassment of a subordinate by a supervisor regardless of whether the employer knew or should have known about the harassment (*243 App DC 323, 753 F2d 141*, rehearing en banc denied *245 App DC 306, 760 F2d 1330*).

On certiorari, the United States Supreme Court (1) affirmed the Court of Appeals' judgment reversing the District Court's judgment and (2) remanded the case for further proceedings. In an opinion by Rehnquist, J., joined by Burger, Ch. J., and White, Powell, Stevens, and O'Connor, JJ., it was held (1) that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment, without showing an economic effect on the plaintiff's employment; (2) that the fact that sex-related conduct is "voluntary," in the sense that a plaintiff was not forced to participate against her will, is not a defense to a sexual harassment suit under Title VII, as the correct inquiry in such cases is whether the plaintiff had indicated by her conduct that the alleged sexual advances were unwelcome; and (3) that employers are not always automatically liable for sexual harassment of employees by their supervisors.

Stevens, J., concurred, joining both the court's opinion and the opinion by Marshall, J., and expressing the view that there was no inconsistency between the two opinions and that the question of statutory construction answered by Marshall, J., was fairly presented by the record.

Marshall, J., joined by Brennan, Blackmun, and Stevens, JJ., concurred in the judgment, expressing the

view that sexual harassment by a supervisor of an employee under his supervision, leading to a discriminatory work environment, should be imputed to the employer for Title VII purposes regardless of whether the employee gave "notice" of the offense.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

CIVIL RIGHTS §7.7

sexual harassment as discrimination --

Headnote:[1]

When a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor "discriminate[s]" on the basis of sex within the meaning of Title VII of the Civil Rights Act of 1964 (*42 USCS 2000e-2(a)(1)*.

[***LEdHN2]

CIVIL RIGHTS §4.4

STATUTES §160.4

employment discrimination -- administrative guidelines --

Headnote:[2]

As an administrative interpretation of the Act by the enforcing agency, guidelines issued by the Equal Employment Opportunity Commission specifying that sexual harassment is a form of sex discrimination prohibited by Title VII of the Civil Rights Act of 1964 (*42 USCS 2000e--2000e*-17), while not controlling on the courts by reason of their authority, constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.

[***LEdHN3]

CIVIL RIGHTS §7.7

sex discrimination -- hostile work environment --

Headnote:[3A][3B]

A plaintiff may establish a violation of Title VII of the Civil Rights Act of 1964 (*42 USCS 2000e--2000e*-17) by proving that discrimination based on sex has created a hostile or abusive work environment; a claim for sexual harassment may lie in the absence of any economic effect on the plaintiff's employment.

[***LEdHN4]

CIVIL RIGHTS §7.7

sexual harassment -- abusive environment --

Headnote:[4]

Not all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII of the Civil Rights Act of 1964 (*42 USCS 2000e--2000e*-17); for sexual harassment to be actionable, it must be sufficiently severe or pervasive as to alter the conditions of the victim's employment and to create an abusive working environment.

[***LEdHN5]

CIVIL RIGHTS §7.7

sexual harassment -- actionable conduct --

Headnote:[5]

A bank employee's allegations are sufficient to state a claim for "hostile environment" sexual harassment under Title VII of the Civil Rights Act of 1964 (*42 USCS 2000e--2000e*-17), where she alleges that her supervisor made repeated demands upon her for sexual favors, usually at the bank, both during and after working hours; that she had sexual intercourse with him about 40 or 50 times; that he fondled her in front of other employees, followed her into the women's restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions; and that he also touched and fondled other women employees of the bank.

[***LEdHN6]

CIVIL RIGHTS §7.7

sexual harassment -- voluntariness --

Headnote:[6]

The fact that sex-related conduct was "voluntary," in the sense that the complaining employee was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII of the Civil Rights Act of 1964 (*42 USCS 2000e--2000e*-17); instead, the correct inquiry is whether the complainant, by her conduct, had indicated that the alleged sexual advances were unwelcome.

[***LEdHN7]

CIVIL RIGHTS §68

sexual harassment -- provocation evidence --

Headnote:[7]

In an action alleging sexual harassment in violation of Title VII of the Civil Rights Act of 1964 (*42 USCS 2000e--2000e*-17), a complainant's sexually provocative speech or dress is relevant in determining whether he or she found particular sexual advances unwelcome; while a Federal District Court must carefully weigh the applicable considerations in deciding whether to admit

evidence of this kind, there is no per se rule against its admissibility.

[***LEdHN8]

CIVIL RIGHTS §27

employer liability -- sexual harassment --

Headnote:[8]

Congress intends courts to look to agency principles for guidance with regard to whether employers are liable under Title VII of the Civil Rights Act of 1964 (*42 USCS 2000e--2000e*-17) for sexual harassment of employees by their superiors.

[***LEdHN9]

CIVIL RIGHTS §27

employer liability -- sexual harassment --

Headnote:[9A][9B]

Employers are not automatically liable under Title VII of the Civil Rights Act of 1964 (*42 USCS 2000e--2000e*-17) for sexual harassment of employees by their supervisors, without regard to the circumstances of a particular case.

[***LEdHN10]

CIVIL RIGHTS §27

employer liability -- notice --

Headnote:[10]

Absence of notice to an employer does not necessarily insulate that employer from liability under Title VII of the Civil Rights Act of 1964 (*42 USCS 2000e--2000e*-17) for sexual harassment of its employees by their supervisors.

[***LEdHN11]

CIVIL RIGHTS §27

employer liability -- grievance procedure --

Headnote:[11]

The mere existence of a grievance procedure and a policy against discrimination, coupled with a complainant's failure to invoke that procedure, does not insulate an employer from liability under Title VII of the Civil Rights Act of 1964 (*42 USCS 2000e--2000e*-17) for sexual harassment of its employees by their supervisors.

SYLLABUS

Respondent former employee of petitioner bank brought an action against the bank and her supervisor at the bank, claiming that during her employment at the bank she had been subjected to sexual harassment by the supervisor in violation of Title VII of the Civil Rights Act of 1964, and seeking injunctive relief and damages. At the trial, the parties presented conflicting testimony about the existence of a sexual relationship between respondent and the supervisor. The District Court denied relief without resolving the conflicting testimony, holding that if respondent and the supervisor did have a sexual relationship, it was voluntary and had nothing to do with her continued employment at the bank, and that therefore respondent was not the victim of sexual harassment. The court then went on to hold that since the bank was without notice, it could not be held liable for the supervisor's alleged sexual harassment. The Court of Appeals reversed and remanded. Noting that a violation of Title VII may be predicated on either of two types of sexual harassment -- (1) harassment that involves the conditioning of employment benefits on sexual favors, and (2) harassment that, while not affecting economic benefits, creates a hostile or offensive working environment -- the Court of Appeals held that since the grievance here was of the second type and the District Court had not considered whether a violation of this type had occurred, a remand was necessary. The court further held that the need for a remand was not obviated by the fact that the District Court had found that any sexual relationship between respondent and the supervisor was a voluntary one, a finding that might have been based on testimony about respondent's "dress and personal fantasies" that "had no place in the litigation." As to the bank's liability, the Court of Appeals held that an employer is absolutely liable for sexual harassment by supervisory personnel, whether or not the employer knew or should have known about it.

Held:

1. A claim of "hostile environment" sexual harassment is a form of sex discrimination that is actionable under Title VII. Pp. 63-69.

(a) The language of Title VII is not limited to "economic" or "tangible" discrimination. Equal Employment Opportunity Commission Guidelines fully support the view that sexual harassment leading to non-economic injury can violate Title VII. Here, respondent's allegations were sufficient to state a claim for "hostile environment" sexual harassment. Pp. 63-67.

(b) The District Court's findings were insufficient to dispose of respondent's "hostile environment" claim. The District Court apparently erroneously believed that a sexual harassment claim will not lie absent an *economic* effect on the complainant's employment, and erroneously focused on the "voluntariness" of respondent's participation in the claimed sexual episodes. The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her participation in them was voluntary. Pp. 67-

68.

(c) The District Court did not err in admitting evidence of respondent's sexually provocative speech and dress. While "voluntariness" in the sense of consent is no defense to a sexual harassment claim, it does not follow that such evidence is irrelevant as a matter of law in determining whether the complainant found particular sexual advances unwelcome. Pp. 68-69.

2. The Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors. While common-law agency principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. In this case, however, the mere existence of a grievance procedure in the bank and the bank's policy against discrimination, coupled with respondent's failure to invoke that procedure, do not necessarily insulate the bank from liability. Pp. 69-73.

COUNSEL: F. Robert Troll, Jr., argued the cause for petitioner. With him on the briefs were Charles H. Fleischer and Randall C. Smith.

Patricia J. Barry argued the cause for respondent Vinson. With her on the brief was Catherine A. MacKinnon. *

* Briefs of amici curiae urging reversal were filed for the United States et al. by Solicitor General Fried, Assistant Attorneys General Reynolds and Willard, Deputy Solicitor General Kuhl, Albert G. Lauber, Jr., John F. Cordes, John F. Daly, and Johnny J. Butler; for the Equal Employment Advisory Council by Robert E. Williams, Douglas S. McDowell, and Garen E. Dodge; for the Chamber of Commerce of the United States by Dannie B. Fogleman and Stephen A. Bokat; and for the Trustees of Boston University by William Burnett Harvey and Michael B. Rosen.

Briefs of amici curiae urging affirmance were filed for the State of New Jersey et al. by W. Cary Edwards, Attorney General of New Jersey, James J. Ciancia, Assistant Attorney General, Susan L. Reisner and Lynn B. Norcia, Deputy Attorneys General, John Van de Kamp, Attorney General of California, Joseph I. Lieberman, Attorney General of Connecticut, Neil F. Hartigan, Attorney General of Illinois, Hubert H. Humphrey III, Attorney General of Minnesota, Paul Bardacke, Attorney General of New Mexico, Robert Abrams, Attorney General of New York, Jeffrey L. Amestoy, Attorney General of Vermont, and Elisabeth S. Shuster; for the American Federation of Labor and the Congress of Industrial Organizations et al. by Marsha S. Berzon, Joy L. Koletsky, Laurence Gold, Winn Newman, and Sarah E. Burns; for the Women's Bar Association of Massachusetts et al. by S. Beville May; for the Women's Bar Association of the State of New York by Stephen N. Shulman and Lynda S. Mounts; for the Women's Legal Defense Fund et al. by Linda R. Singer, Anne E. Simon, Nadine Taub, Judith Levin, and Barry H. Gottfried; for the Working Women's Institute et al. by Laurie E. Foster; and for Senator Paul Simon et al. by Michael H. Salsbury.

JUDGES: REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, STEVENS, and O'CONNOR, JJ., joined. STEVENS, J., filed a concurring opinion, post, p. 73. MARSHALL, J., filed an opinion concurring in the judgment, in which BRENNAN, BLACKMUN, and STEVENS, JJ., joined, post, p. 74.

OPINION BY: REHNQUIST

OPINION

[*59] [***55] [**2401] JUSTICE REHNQUIST delivered the opinion of the Court.

This case presents important questions concerning claims of workplace "sexual harassment" brought under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, *42 U. S. C. § 2000e et seq.*

I

In 1974, respondent Mechelle Vinson met Sidney Taylor, a vice president of what is now petitioner Meritor Savings Bank [**2402] (bank) and manager of one of its branch offices. When respondent asked whether she might obtain employment at the bank, Taylor gave her an application, which she completed and returned the next day; later that same day Taylor called her to say that she had been hired. With Taylor as her supervisor, respondent started as a teller-trainee, and thereafter was promoted to teller, head teller, and assistant [*60] branch manager. She worked at the same branch for four years, and it is undisputed that her advancement there was based on merit alone. In September 1978, respondent notified Taylor that she was taking sick leave for an indefinite period. On November 1, 1978, the bank discharged her for excessive use of that leave.

Respondent brought this action against Taylor and the bank, claiming that during her four years at the bank she had "constantly been subjected to sexual harassment"

by Taylor in violation of Title VII. She sought injunctive relief, compensatory and punitive damages against Taylor and the bank, and attorney's fees.

At the 11-day bench trial, the parties presented conflicting testimony about Taylor's behavior during respondent's employment. + Respondent testified that during her probationary period as a teller-trainee, Taylor treated her in a fatherly way and made no sexual advances. Shortly thereafter, however, he invited her out to dinner and, during the course of the meal, suggested that they go to a motel to have sexual relations. At first she refused, but out of what she described as fear of losing her job she eventually agreed. According to respondent, Taylor thereafter made repeated demands upon her for sexual favors, usually at the branch, both during and after business hours; she estimated that over the next several years she had intercourse with him some 40 or 50 times. In addition, respondent testified that Taylor fondled her in front of other employees, followed her into the women's restroom when she went there alone, exposed himself to her, and even forcibly raped her on several occasions. These activities ceased after [***56] 1977, respondent stated, when she started going with a steady boyfriend.

> + Like the Court of Appeals, this Court was not provided a complete transcript of the trial. We therefore rely largely on the District Court's opinion for the summary of the relevant testimony.

Respondent also testified that Taylor touched and fondled other women employees of the bank, and she attempted to [*61] call witnesses to support this charge. But while some supporting testimony apparently was admitted without objection, the District Court did not allow her "to present wholesale evidence of a pattern and practice relating to sexual advances to other female employees in her case in chief, but advised her that she might well be able to present such evidence in rebuttal to the defendants' cases." *Vinson* v. *Taylor*, 22 EPD para. 30,708, p. 14,693, n. 1, *23 FEP Cases 37, 38-39, n. 1 (DC 1980)*. Respondent did not offer such evidence in rebuttal. Finally, respondent testified that because she was afraid of Taylor she never reported his harassment to any of his supervisors and never attempted to use the bank's complaint procedure.

Taylor denied respondent's allegations of sexual activity, testifying that he never fondled her, never made suggestive remarks to her, never engaged in sexual intercourse with her, and never asked her to do so. He contended instead that respondent made her accusations in response to a business-related dispute. The bank also denied respondent's allegations and asserted that any sexual harassment by Taylor was unknown to the bank and engaged in without its consent or approval.

The District Court denied relief, but did not resolve the conflicting testimony about the existence of a sexual relationship between respondent and Taylor. It found instead that

"[if] [respondent] and Taylor did engage in an intimate or sexual relationship during the time of [respondent's] employment [**2403] with [the bank], that relationship was a voluntary one having nothing to do with her continued employment at [the bank] or her advancement or promotions at that institution." *Id.*, at 14,692, 23 FEP Cases, at 42 (footnote omitted).

The court ultimately found that respondent "was not the victim of sexual harassment and was not the victim of sexual discrimination" while employed at the bank. *Ibid., 23 FEP Cases, at 43.*

[*62] Although it concluded that respondent had not proved a violation of Title VII, the District Court nevertheless went on to address the bank's liability. After noting the bank's express policy against discrimination, and finding that neither respondent nor any other employee had ever lodged a complaint about sexual harassment by Taylor, the court ultimately concluded that "the bank was without notice and cannot be held liable for the alleged actions of Taylor." *Id.*, at 14,691, 23 FEP Cases, at 42.

The Court of Appeals for the District of Columbia Circuit reversed. *243 U. S. App. D. C. 323, 753 F.2d 141 (1985).* Relying on its earlier holding in *Bundy v. Jackson, 205 U. S. App. D. C. 444, 641 F.2d 934 (1981)*, decided after the trial in this case, the court stated that a violation of Title VII may be predicated on either of two types of sexual harassment: harassment that involves the conditioning of concrete employment benefits on sexual favors, and harassment that, while not affecting economic benefits, creates a hostile or offensive working environment. The court drew additional support for this position [***57] from the Equal Employment Opportunity Commission's Guidelines on Discrimination Because of Sex, *29 CFR § 1604.11(a) (1985)*, which set out these two types of sexual harassment claims. Believing that "Vinson's grievance was clearly of the [hostile environment] type," *243 U. S. App. D. C., at 327, 753 F.2d, at 145*, and that the District Court had not considered whether a violation of this type had occurred, the court concluded that a remand was necessary.

The court further concluded that the District Court's finding that any sexual relationship between respondent and Taylor "was a voluntary one" did not obviate the need for a remand. "[Uncertain] as to precisely what the [district] court meant" by this finding, the Court of Appeals held that if the evidence otherwise showed that "Taylor made Vinson's toleration of sexual harassment a condition of her employment," her voluntariness "had no

materiality whatsoever." [*63] *Id., at 328, 753 F.2d, at 146.* The court then surmised that the District Court's finding of voluntariness might have been based on "the voluminous testimony regarding respondent's dress and personal fantasies," testimony that the Court of Appeals believed "had no place in this litigation." *Id., at 328, n. 36, 753 F.2d, at 146, n. 36.*

As to the bank's liability, the Court of Appeals held that an employer is absolutely liable for sexual harassment practiced by supervisory personnel, whether or not the employer knew or should have known about the misconduct. The court relied chiefly on Title VII's definition of "employer" to include "any agent of such a person," *42 U. S. C. § 2000e(b)*, as well as on the EEOC Guidelines. The court held that a supervisor is an "agent" of his employer for Title VII purposes, even if he lacks authority to hire, fire, or promote, since "the mere existence -- or even the appearance -- of a significant degree of influence in vital job decisions gives any supervisor the opportunity to impose on employees." *243 U. S. App. D. C., at 332, 753 F.2d, at 150.*

In accordance with the foregoing, the Court of Appeals reversed the judgment of the District Court and remanded the case for further proceedings. A subsequent suggestion for rehearing en banc was denied, with three judges dissenting. *245 U. S. App. D. C. 306, 760 F.2d 1330 (1985).* We granted certiorari, *474 U.S. 1047 (1985)*, and now affirm but for different reasons.

[**2404] II

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." *42 U. S. C. § 2000e-2(a)(1).* The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives. 110 Cong. Rec. 2577-2584 (1964). The principal argument in opposition [*64] to the amendment was that "sex discrimination" was sufficiently different from other types of discrimination that it ought to receive separate legislative treatment. See *id.*, at [***58] 2577 (statement of Rep. Celler quoting letter from United States Department of Labor); *id.*, at 2584 (statement of Rep. Green). This argument was defeated, the bill quickly passed as amended, and we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on "sex."

[***LEdHR1] [1]Respondent argues, and the Court of Appeals held, that unwelcome sexual advances that create an offensive or hostile working environment violate Title VII. Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor "discriminate[s]" on the basis of sex. Petitioner apparently does not challenge this proposition. It contends instead that in prohibiting discrimination with respect to "compensation, terms, conditions, or privileges" of employment, Congress was concerned with what petitioner describes as "tangible loss" of "an economic character," not "purely psychological aspects of the workplace environment." Brief for Petitioner 30-31, 34. In support of this claim petitioner observes that in both the legislative history of Title VII and this Court's Title VII decisions, the focus has been on tangible, economic barriers erected by discrimination.

We reject petitioner's view. First, the language of Title VII is not limited to "economic" or "tangible" discrimination. The phrase "terms, conditions, or privileges of employment" evinces a congressional intent "'to strike at the entire spectrum of disparate treatment of men and women'" in employment. *Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 707, n. 13 (1978)*, quoting *Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (CA7 1971)*. Petitioner has pointed to nothing in the Act to suggest that Congress contemplated the limitation urged here.

[*65] [***LEdHR2] [2]Second, in 1980 the EEOC issued Guidelines specifying that "sexual harassment," as there defined, is a form of sex discrimination prohibited by Title VII. As an "administrative interpretation of the Act by the enforcing agency," *Griggs v. Duke Power Co., 401 U.S. 424, 433-434 (1971)*, these Guidelines, "'while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance,'" *General Electric Co.* v. *Gilbert, 429 U.S. 125, 141-142 (1976)*, quoting *Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)*. The EEOC Guidelines fully support the view that harassment leading to noneconomic injury can violate Title VII.

In defining "sexual harassment," the Guidelines first describe the kinds of workplace conduct that may be actionable under Title VII. These include "[unwelcome] sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." *29 CFR § 1604.11(a) (1985).* Relevant to the charges at issue in this case, the Guidelines provide that such sexual misconduct constitutes prohibited "sexual harassment," whether or not it is directly linked to the grant or denial of an economic *quid pro quo*, where "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance [***59] or creating an intimidating, [**2405] hostile, or offensive working environment." *§ 1604.11(a)(3).*

In concluding that so-called "hostile environment" *(i.*

e., non *quid pro quo)* harassment violates Title VII, the EEOC drew upon a substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult. See generally *45 Fed. Reg. 74676 (1980). Rogers v. EEOC, 454 F.2d 234 (CA5 1971)*, cert. denied, *406 U.S. 957 (1972)*, was apparently the first case to recognize a cause of action based upon a discriminatory work environment. In *Rogers*, the Court of Appeals for the Fifth [*66] Circuit held that a Hispanic complainant could establish a Title VII violation by demonstrating that her employer created an offensive work environment for employees by giving discriminatory service to its Hispanic clientele. The court explained that an employee's protections under Title VII extend beyond the economic aspects of employment:

"[The] phrase 'terms, conditions or privileges of employment' in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination. . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers . . . ." *454 F.2d, at 238.*

Courts applied this principle to harassment based on race, *e. g., Firefighters Institute for Racial Equality v. St. Louis, 549 F.2d 506, 514-515* (CA8), cert. denied *sub nom. Banta v. United States, 434 U.S. 819 (1977)*; *Gray v. Greyhound Lines, East, 178 U. S. App. D. C. 91, 98, 545 F.2d 169, 176 (1976)*, religion, *e. g., Compston v. Borden, Inc., 424 F.Supp. 157 (SD Ohio 1976)*, and national origin, *e. g., Cariddi v. Kansas City Chiefs Football Club, 568 F.2d 87, 88 (CA8 1977)*. Nothing in Title VII suggests that a hostile environment based on discriminatory *sexual* harassment should not be likewise prohibited. The Guidelines thus appropriately drew from, and were fully consistent with, the existing case law.

[***LEdHR3A] [3A]Since the Guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment. As the Court of Appeals for the Eleventh Circuit wrote in *Henson v. Dundee, 682 F.2d 897, 902 (1982)*:

[*67] "Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets."

Accord, *Katz v. Dole, 709 F.2d 251, 254-255 (CA4 1983)*; *Bundy v. Jackson, 205 U. S. App. D. C., at 444-454, 641 F.2d, at 934-944*; *Zabkowicz v. West Bend Co., 589 F.Supp. 780 (ED Wis. 1984).*

[***60] [***LEdHR4] [4] [***LEdHR5] [5]Of course, as the courts in both *Rogers* and *Henson* recognized, not all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII. See *Rogers v. EEOC, supra, at 238* ("mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" would not affect the conditions of employment to sufficiently significant degree to violate Title VII); *Henson, 682 F.2d, at 904* (quoting same). For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment." *Ibid.* Respondent's allegations in this case -- which include not only pervasive harassment but [**2406] also criminal conduct of the most serious nature -- are plainly sufficient to state a claim for "hostile environment" sexual harassment.

[***LEdHR3B] [3B]The question remains, however, whether the District Court's ultimate finding that respondent "was not the victim of sexual harassment," 22 EPD para. 30,708, at 14,692-14,693, *23 FEP Cases, at 43*, effectively disposed of respondent's claim. The Court of Appeals recognized, we think correctly, that this ultimate finding was likely based on one or both of two erroneous views of the law. First, the District Court apparently believed that a claim for sexual harassment will not lie [*68] absent an *economic* effect on the complainant's employment. See *ibid.* ("It is without question that sexual harassment of female employees in which they are asked or required to submit to sexual demands as a *condition to obtain employment or to maintain employment or to obtain promotions* falls within protection of Title VII") (emphasis added). Since it appears that the District Court made its findings without ever considering the "hostile environment" theory of sexual harassment, the Court of Appeals' decision to remand was correct.

[***LEdHR6] [6]Second, the District Court's conclusion that no actionable harassment occurred might have rested on its earlier "finding" that "[if] [respondent] and Taylor did engage in an intimate or sexual relationship . . . , that relationship was a voluntary one." *Id.*, at 14,692, 23 FEP Cases, at 42. But the fact that sex-

related conduct was "voluntary," in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. The gravamen of any sexual harassment claim is that the alleged sexual advances were "unwelcome." *29 CFR § 1604.11(a) (1985)*. While the question whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact, the District Court in this case erroneously focused on the "voluntariness" of respondent's participation in the claimed sexual episodes. The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.

[***LEdHR7] [7]Petitioner contends that even if this case must be remanded to the District Court, the Court of Appeals erred in one of the terms of its remand. Specifically, the Court of Appeals stated that testimony about respondent's "dress and personal [***61] fantasies," *243 U. S. App. D. C., at 328, n. 36, 753 F.2d, at 146, n. 36*, which the District Court apparently admitted [*69] into evidence, "had no place in this litigation." *Ibid.* The apparent ground for this conclusion was that respondent's voluntariness *vel non* in submitting to Taylor's advances was immaterial to her sexual harassment claim. While "voluntariness" in the sense of consent is not a defense to such a claim, it does not follow that a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome. To the contrary, such evidence is obviously relevant. The EEOC Guidelines emphasize that the trier of fact must determine the existence of sexual harassment in light of "the record as a whole" and "the totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred." *29 CFR § 1604.11(b) (1985)*. Respondent's claim that any marginal relevance of the evidence in question was outweighed by the potential for unfair prejudice is the sort of argument properly addressed to the District Court. In this case the District Court concluded that the evidence should be admitted, and the Court of Appeals' contrary conclusion was based upon the erroneous, categorical view that testimony about provocative dress and publicly expressed sexual fantasies "had no place in this litigation." *243 U. S. App. D. C., at 328, n. 36, 753 F.2d, at 146, n. 36*. While the District Court must carefully weigh the [**2407] applicable considerations in deciding whether to admit evidence of this kind, there is no *per se* rule against its admissibility.

III

Although the District Court concluded that respondent had not proved a violation of Title VII, it nevertheless went on to consider the question of the bank's liability. Finding that "the bank was without notice" of Taylor's alleged conduct, and that notice to Taylor was not the equivalent of notice to the bank, the court concluded that the bank therefore could not be held liable for Taylor's alleged actions. The Court of Appeals took the opposite view, holding that an employer is [*70] strictly liable for a hostile environment created by a supervisor's sexual advances, even though the employer neither knew nor reasonably could have known of the alleged misconduct. The court held that a supervisor, whether or not he possesses the authority to hire, fire, or promote, is necessarily an "agent" of his employer for all Title VII purposes, since "even the appearance" of such authority may enable him to impose himself on his subordinates.

The parties and *amici* suggest several different standards for employer liability. Respondent, not surprisingly, defends the position of the Court of Appeals. Noting that Title VII's definition of "employer" includes any "agent" of the employer, she also argues that "so long as the circumstance is work-related, the supervisor is the employer and the employer is the supervisor." Brief for Respondent 27. Notice to Taylor that the advances were unwelcome, therefore, was notice to the bank.

Petitioner argues that respondent's failure to use its established grievance procedure, or to otherwise put it on notice of the alleged misconduct, insulates petitioner from liability for Taylor's wrongdoing. A [***62] contrary rule would be unfair, petitioner argues, since in a hostile environment harassment case the employer often will have no reason to know about, or opportunity to cure, the alleged wrongdoing.

The EEOC, in its brief as *amicus curiae*, contends that courts formulating employer liability rules should draw from traditional agency principles. Examination of those principles has led the EEOC to the view that where a supervisor exercises the authority actually delegated to him by his employer, by making or threatening to make decisions affecting the employment status of his subordinates, such actions are properly imputed to the employer whose delegation of authority empowered the supervisor to undertake them. Brief for United States and EEOC as *Amici Curiae* 22. Thus, the courts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel, [*71] whether or not the employer knew, should have known, or approved of the supervisor's actions. *E. g., Anderson v. Methodist Evangelical Hospital, Inc., 464 F.2d 723, 725 (CA6 1972)*.

The EEOC suggests that when a sexual harassment claim rests exclusively on a "hostile environment" theory, however, the usual basis for a finding of agency will often disappear. In that case, the EEOC believes,

agency principles lead to

"a rule that asks whether a victim of sexual harassment had reasonably available an avenue of complaint regarding such harassment, and, if available and utilized, whether that procedure was reasonably responsive to the employee's complaint. If the employer has an expressed policy against sexual harassment and has implemented a procedure specifically designed to resolve sexual harassment claims, and if the victim does not take advantage of that procedure, the employer should be shielded from liability absent actual knowledge of the sexually hostile environment (obtained, *e. g.*, by the filing of a charge with the EEOC or a comparable state agency). In all other cases, the employer will be liable if it has actual knowledge of the harassment or if, considering all the facts of the case, the victim in question had no reasonably available avenue for making his or her complaint known to appropriate [**2408] management officials." Brief for United States and EEOC as *Amici Curiae* 26.

As respondent points out, this suggested rule is in some tension with the EEOC Guidelines, which hold an employer liable for the acts of its agents without regard to notice. *29 CFR § 1604.11(c) (1985)*. The Guidelines do require, however, an "[examination of] the circumstances of the particular employment relationship and the job [functions] performed by the individual in determining whether an individual acts in either a supervisory or agency capacity." *Ibid.*

[*72] This debate over the appropriate standard for employer liability has a rather abstract quality about it given the state of the record in this case. We do not know at this stage whether Taylor made any sexual advances toward respondent at all, let alone whether those advances [***63] were unwelcome, whether they were sufficiently pervasive to constitute a condition of employment, or whether they were "so pervasive and so long continuing . . . that the employer must have become conscious of [them]," *Taylor v. Jones, 653 F.2d 1193, 1197-1199 (CA8 1981)* (holding employer liable for racially hostile working environment based on constructive knowledge).

[***LEdHR8] [8] [***LEdHR9A] [9A] [***LEdHR10] [10]We therefore decline the parties' invitation to issue a definitive rule on employer liability, but we do agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area. While such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer, *42 U. S. C. § 2000e(b)*, surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. For this reason, we hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors. See generally Restatement (Second) of Agency §§ 219-237 (1958). For the same reason, absence of notice to an employer does not necessarily insulate that employer from liability. *Ibid.*

[***LEdHR11] [11]Finally, we reject petitioner's view that the mere existence of a grievance procedure and a policy against discrimination, coupled with respondent's failure to invoke that procedure, must insulate petitioner from liability. While those facts are plainly relevant, the situation before us demonstrates why they are not necessarily dispositive. Petitioner's general nondiscrimination policy did not address sexual harassment in particular, and thus did not alert employees to their employer's [*73] interest in correcting that form of discrimination. App. 25. Moreover, the bank's grievance procedure apparently required an employee to complain first to her supervisor, in this case Taylor. Since Taylor was the alleged perpetrator, it is not altogether surprising that respondent failed to invoke the procedure and report her grievance to him. Petitioner's contention that respondent's failure should insulate it from liability might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward.

IV

[***LEdHR9B] [9B]In sum, we hold that a claim of "hostile environment" sex discrimination is actionable under Title VII, that the District Court's findings were insufficient to dispose of respondent's hostile environment claim, and that the District Court did not err in admitting testimony about respondent's sexually provocative speech and dress. As to employer liability, we conclude that the Court of Appeals was wrong to entirely disregard agency principles and impose absolute liability on employers for the acts of their supervisors, regardless of the circumstances of a particular case.

Accordingly, the judgment of the Court of Appeals reversing the judgment of the District Court is affirmed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

CONCUR BY: STEVENS; MARSHALL

CONCUR

[***64] [**2409] JUSTICE STEVENS, concurring.

Because I do not see any inconsistency between the two opinions, and because I believe the question of statutory construction that JUSTICE MARSHALL has answered is fairly presented by the record, I join both the

Court's opinion and JUSTICE MARSHALL's opinion.

[*74] JUSTICE MARSHALL, with whom JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE STEVENS join, concurring in the judgment.

I fully agree with the Court's conclusion that workplace sexual harassment is illegal, and violates Title VII. Part III of the Court's opinion, however, leaves open the circumstances in which an employer is responsible under Title VII for such conduct. Because I believe that question to be properly before us, I write separately.

The issue the Court declines to resolve is addressed in the EEOC Guidelines on Discrimination Because of Sex, which are entitled to great deference. See *Griggs v. Duke Power Co., 401 U.S. 424, 433-434 (1971)* (EEOC Guidelines on Employment Testing Procedures of 1966); see also *ante*, at 65. The Guidelines explain:

"Applying general Title VII principles, an employer . . . is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job [functions] performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

"With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action." *29 CFR §§ 1604.11(c),(d) (1985).*

The Commission, in issuing the Guidelines, explained that its rule was "in keeping with the general standard of employer [*75] liability with respect to agents and supervisory employees. . . . [The] Commission and the courts have held for years that an employer is liable if a supervisor or an agent violates the Title VII, regardless of knowledge or any other mitigating factor." *45 Fed. Reg. 74676 (1980).* I would adopt the standard set out by the Commission.

An employer can act only through individual supervisors and employees; discrimination is rarely carried out pursuant to a formal vote of a corporation's board of directors. Although an employer may sometimes adopt companywide discriminatory policies violative of Title VII, acts that may constitute Title VII violations are generally effected through the actions of individuals, and often an individual may take such a step even in defiance of company policy. Nonetheless, Title VII remedies, such as reinstatement and backpay, [***65] generally run against the employer as an entity. [1] The question thus arises as to the circumstances under which an employer will be held liable under Title VII for the acts of its employees.

1 The remedial provisions of Title VII were largely modeled on those of the National Labor Relations Act (NLRA). See *Albemarle Paper Co.* v. *Moody, 422 U.S. 405, 419, and n. 11 (1975)*; see also *Franks v. Bowman Transportation Co., 424 U.S. 747, 768-770 (1976).*

The answer supplied by general Title VII law, like that supplied by federal labor law, is that the act of a supervisory employee or agent is imputed to the employer. [2] Thus, [**2410] for example, when a supervisor discriminatorily fires or refuses to promote a black employee, that act is, without more, considered the act of the employer. The courts do not stop to consider whether the employer otherwise had "notice" of the action, or even whether the supervisor had actual authority to act as he did. *E. g., Flowers v. Crouch-Walker Corp.,* [*76] *552 F.2d 1277, 1282 (CA7 1977)*; *Young v. Southwestern Savings and Loan Assn., 509 F.2d 140 (CA5 1975)*; *Anderson v. Methodist Evangelical Hospital, Inc., 464 F.2d 723 (CA6 1972).* Following that approach, every Court of Appeals that has considered the issue has held that sexual harassment by supervisory personnel is automatically imputed to the employer when the harassment results in tangible job detriment to the subordinate employee. See *Horn v. Duke Homes, Inc., Div. of Windsor Mobile Homes, 755 F.2d 599, 604-606 (CA7 1985)*; *Craig v. Y & Y Snacks, Inc., 721 F.2d 77, 80-81 (CA3 1983)*; *Katz v. Dole, 709 F.2d 251, 255, n. 6 (CA4 1983)*; *Henson v. Dundee, 682 F.2d 897, 910 (CA11 1982)*; *Miller v. Bank of America, 600 F.2d 211, 213 (CA9 1979).*

2 For NLRA cases, see, *e. g., Graves Trucking, Inc.* v. *NLRB, 692 F.2d 470 (CA7 1982)*; *NLRB v. Kaiser Agricultural Chemical, Division of Kaiser Aluminum & Chemical Corp., 473 F.2d 374, 384 (CA5 1973)*; *Amalgamated Clothing Workers of America v. NLRB, 124 U. S. App. D. C. 365, 377, 365 F.2d 898, 909 (1966).*

The brief filed by the Solicitor General on behalf of the United States and the EEOC in this case suggests that a different rule should apply when a supervisor's harassment "merely" results in a discriminatory work environment. The Solicitor General concedes that sexual harassment that affects tangible job benefits is an exercise of authority delegated to the supervisor by the employer, and thus gives rise to employer liability. But, departing from the EEOC Guidelines, he argues that the case of a supervisor merely creating a discriminatory work environment is different because the supervisor "is not exercising, or threatening to exercise, actual or

apparent authority to make personnel decisions affecting the victim." Brief for United States and EEOC as *Amici Curiae* 24. In the latter situation, he concludes, some further notice requirement should therefore be necessary.

The Solicitor General's position is untenable. A supervisor's responsibilities do not begin and end with the power to hire, fire, and discipline employees, or with the power to recommend such actions. Rather, a supervisor is charged with the day-to-day supervision of the work environment and with ensuring a safe, productive workplace. There is no reason why abuse of the latter authority should have different consequences [***66] than abuse of the former. In both cases it is the authority [*77] vested in the supervisor by the employer that enables him to commit the wrong: it is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates. There is therefore no justification for a special rule, to be applied *only* in "hostile environment" cases, that sexual harassment does not create employer liability until the employee suffering the discrimination notifies other supervisors. No such requirement appears in the statute, and no such requirement can coherently be drawn from the law of agency.

Agency principles and the goals of Title VII law make appropriate some limitation on the liability of employers for the acts of supervisors. Where, for example, a supervisor has no authority over an employee, because the two work in wholly different parts of the employer's business, it may be improper to find strict employer liability. See *29 CFR § 1604.11(c) (1985)*. Those considerations, however, do not justify the creation of a special "notice" rule in hostile environment cases.

Further, nothing would be gained by crafting such a rule. In the "pure" hostile environment case, where an employee files an EEOC complaint alleging sexual harassment in the workplace, the employee seeks not money damages but injunctive relief. See *Bundy v. Jackson, 205 U. S. App. D. C. 444, 456, n. 12, 641 F.2d 934, 946, n. 12 (1981)*. Under Title VII, the EEOC must notify an employer of charges made against it within 10 days after receipt of the complaint. *42 U. S. C. § 2000e-5(b)*. If the charges appear to be based on "reasonable cause," the EEOC must attempt to [**2411] eliminate the offending practice through "informal methods of conference, conciliation, and persuasion." *Ibid.* An employer whose internal procedures assertedly would have redressed the discrimination can avoid injunctive relief by employing these procedures after receiving notice of the complaint or during the conciliation period. Cf. Brief for United [*78] States and EEOC as *Amici Curiae* 26. Where a complainant, on the other hand, seeks backpay on the theory that a hostile work environment effected a constructive termination, the existence of an internal complaint procedure may be a factor in determining not the employer's liability but the remedies available against it. Where a complainant without good reason bypassed an internal complaint procedure she knew to be effective, a court may be reluctant to find constructive termination and thus to award reinstatement or backpay.

I therefore reject the Solicitor General's position. I would apply in this case the same rules we apply in all other Title VII cases, and hold that sexual harassment by a supervisor of an employee under his supervision, leading to a discriminatory work environment, should be imputed to the employer for Title VII purposes regardless of whether the employee gave "notice" of the offense.

REFERENCES

15 Am Jur 2d, Civil Rights 154, 166.5, *380*

5 Am Jur Pl & Pr Forms (Rev), Civil Rights, Forms 61.11, 65.1

29 Am Jur Proof of Facts 2d 335, Wrongful Discharge of At-Will Employee--Sexual Harassment

21 Am Jur Trials 1, Employment Discrimination Action Under Federal Civil Rights Acts

42 USCS 2000e-2000e-17

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Index to Annotations, Discrimination; Harassment; Labor and Employment; Sex Discrimination

Annotation References:

When is work environment intimidating, hostile, or offensive so as to constitute sexual harassment in violation of Title VII of Civil Rights Act of 1964, as amended (*42 USCS 2000e et seq.*). *78 ALR Fed 252*.

Discoverability and admissibility of plaintiff's past sexual behavior in Title VII sexual harassment action. *73 ALR Fed 748*.

Sexual advances by employee's superior as sex discrimination within Title VII of Civil Rights Act of 1964, as amended (*42 USCS 2000e et seq.*). *46 ALR Fed 224*.

Construction and application of provisions of Title VII of Civil Rights Act of 1964 (*42 USCS 2000e et seq.*) making sex discrimination in employment unlawful. *12*

ALR Fed 15.

rights law. *18 ALR4th 328.*

On-the-job sexual harassment as violation of state civil

the evidence is such that [*17] a reasonable jury could return a verdict for the nonmoving party." *Id.* In deciding a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id. at 255.*

The burden initially is on the moving party to demonstrate an absence of a genuine issue of material fact. *Celotex, 477 U.S. at 323.* If, and only if, the moving party meets its burden, then the non-moving party must produce enough evidence to rebut the moving party's claim and create a genuine issue of material fact. *Id. at 322-23.* If the non-moving party meets this burden, then the motion will be denied. *Nissan Fire & Marine Ins. Co. v. Fritz Co., Inc., 210 F.3d 1099, 1103 (9th Cir. 2000).*

ANALYSIS

1. ISSUES OF CONSENT

Starbucks and Horton have each filed motions for summary judgment on the claims asserted against them. Some of the issues in the two motions overlap. Others diverge. The Court will address Starbucks's Motion and will then turn to Horton's Motion. But before reaching the specifics of either motion, it will be helpful to address the parties' arguments concerning whether Plaintiff had capacity to consent and actually did consent to Horton's [*18] conduct. Resolution of these arguments will impact multiple claims at issue, such as Plaintiff's sexual harassment claim.

1.1. Whether a Minor Can Consent to Sex with an Adult

The parties dispute whether a person under 18 in California can legally consent to sex. Defendants argue that they can, and the Court agrees.

California Penal Code section 261.5 ("*Section 261.5*") generally makes it a crime for a person over 18 to have sexual intercourse with a person under 18. Based on this statute, Plaintiff argues that *Section 261.5* "makes clear that Doe didn't have the capacity to consent to Horton's sexual contact[.]" (Opposition to Starbucks's Motion ("OSM") 16:8-9.) Plaintiff's argument is incorrect.

Section 261.5 does not make minors incapable of consenting to sex. The California Supreme Court explained:

> In 1970, the Legislature created the crime of unlawful sexual intercourse with a minor (*§ 261.5*) and amended the rape statute (*§ 261*) so that it no longer included sex with a minor in the definition of rape. As a result, the circumstances surrounding sexual intercourse with a minor became highly relevant, because this conduct might in some cases be a distinct and less serious crime than rape, [*19] particularly where the minor engages in the sexual act knowingly and voluntarily. (Compare *§ 261.5, subds. (b), (c), (d)* [punishment for unlawful sexual intercourse with a minor] with *§ 264, subd. (a)* [punishment for rape].) In making this change, the Legislature implicitly acknowledged that, *in some cases at least, a minor may be capable of giving legal consent to sexual relations.* If that were not so, then every violation of *section 261.5* would also constitute rape under *section 261, subdivision (a)(1).* Of course, a minor might still be found incapable of giving legal consent to sexual intercourse in a particular case, but [the legislature] abrogate[ed] the rule that a girl under 18 is in all cases incapable of giving such legal consent[.]"

People v. Tobias, 25 Cal. 4th 327, 333-34, 106 Cal. Rptr. 2d 80, 21 P.3d 758 (2001) (emphasis added and citations omitted). While *Tobias* was a criminal case, the rule that "a minor may be capable of giving legal consent to sexual relations" has been extended to non-criminal cases. *See Donaldson v. Dept. of Real Estate of State of Cal., 134 Cal. App. 4th 948, 961-62, 36 Cal. Rptr. 3d 577 (2005).*

Plaintiff cites *Doe v. Oberweis Dairy, 456 F.3d 704 (7th Cir. 2006)*, for the proposition that minors have no [*20] capacity to consent to sex with adults. But *Oberweis* is a Seventh Circuit case that does not consider California law. Thus, statements in *Oberweis* that are contradicted by the California Supreme Court's statements in *Tobias* have little persuasive effect.

In conclusion, persons under 18 may, in some cases, have capacity to consent to sex with persons over 18. Whether a minor actually consented to sex is a more delicate question, but the Court cannot agree with Plaintiff that "a minor cannot legally consent to sexual intercourse with an adult." (OSM 17:19-20.)

1.2 Whether Plaintiff Consented to Horton's Conduct

While *Tobias* states that minors "*may* be capable of giving legal consent to sexual relations," the Court must address whether Plaintiff *actually* consented to Horton's conduct in this case. The parties submitted considerable evidence and objections on the issue. The Court finds that there is a triable factual issue concerning whether Plaintiff consented to Horton's conduct.

Plaintiff presents sufficient evidence for a reasonable

jury to find that she did not consent to Horton's conduct. Plaintiff was 16 and Horton was her 24 year old supervisor. While Defendants submit ample evidence [*21] that Plaintiff at times asked Horton for sex and had positive feelings toward him, Plaintiff submits evidence that she initially did not want to date Horton and only acquiesced after he persisted asking her out for months. Further, Plaintiff submits evidence that Horton was aware that she was under the influence of alcohol and marijuana during many of their sexual encounters. Considering this evidence, a reasonable jury could conclude that Plaintiff's acquiescence to sex with Horton resulted from Horton's manipulation and coercion.

It is certainly possible that a jury could find that Plaintiff consented to Horton's conduct. But since there is a genuine factual dispute on the issue, the Court cannot make this finding as a matter of law.

2. STARBUCKS'S MOTION

2.1 Plaintiff's Negligence Related Claims

Plaintiff asserts four negligence related claims, including claims for (1) negligence; (2) negligent supervision; (3) negligent hiring/retention; and (4) negligent failure to warn, train, or educate. Starbucks groups these claims together and argues that they must fail for the same reasons. It contends that they should be dismissed because there is no evidence Starbucks knew of Plaintiff's relationship [*22] with Horton or had any reason to suspect that Horton would engage in wrongdoing "until Plaintiff's mother complained to store manager Lena Nobel in February 2006." (Starbucks's Reply 19:26-28.) This argument is unpersuasive.

Plaintiff presents sufficient evidence for a reasonable trier of fact to find that Starbucks should have known about Plaintiff's sexual relationship with Horton before her mother's complaint to Nobel. In January 2006, Nobel suspected Plaintiff and Horton were "doing more than just hanging out," (Nobel Depo. 124:7-11), and she discussed with Kelly the possibility that the two were dating, (Nobel Depo. 89:13-15). Yet neither of them made thorough inquiries into the situation. Even after Plaintiff was transferred to a different store, Starbucks did not perform a formal investigation, did not discipline Horton, and did not seek "to ensure that Horton had no further contact with [Plaintiff]." (OSM 21:12-16.) Under these circumstances, a reasonable jury could find that Starbucks was negligent.

Starbucks also argues that Plaintiff "cannot show any causal link between Starbucks['s] alleged negligence in hiring, retaining, training, or supervising Horton and [Plaintiff's] [*23] alleged injuries." (Starbucks's Mot. 1:22-24.) More particularly, Starbucks contends that Plaintiff's continuance of the relationship with Horton "once she was transferred to a different store severs any possible causal link; Plaintiff would have continued the relationship even if Horton had been terminated from employment." (Starbucks's Mot. 8:25-27.) The Court disagrees. While causation will undoubtedly be an issue at trial, Plaintiff has presented sufficient evidence to withstand summary judgment.

Starbucks does not make particularized attacks on Plaintiff's different negligence related claims, and those claims survive Starbucks's Motion.

2.2 Plaintiff's Claims for Assault, Battery, and Intentional Infliction of Emotional Distress

Plaintiff asserts claims for assault, battery, and intentional infliction of emotional distress against Starbucks. Starbucks argues that "none of Plaintiff's intentional tort claims . . . can survive summary judgment because no basis exists for holding Starbucks liable for Horton's alleged intentional wrongdoing." (Starbucks's Mot. 1:25-27.) Plaintiff argues that Starbucks's "failure to investigate or take remedial action against Horton amounts to ratification [*24] of Horton's sexual abuse of [Plaintiff]" sufficient to maintain claims for assault, battery, and intentional infliction of emotional distress. (OSM 21:20-21.) The Court finds that a triable issue of fact exists concerning whether Starbucks ratified Horton's conduct, so these intentional tort claims survive Starbucks's Motion.

An employer may be liable for the intentional torts of an employee under a theory of ratification if "the employer, after being informed of the employee's actions, does not fully investigate and fails to repudiate the employee's conduct by redressing the harm done and punishing or discharging." *Fisher v. San Pedro Peninsula Hosp., 214 Cal. App. 3d 590, 621, 262 Cal. Rptr. 842 (1989).* But where the employer repudiates wrongful conduct, courts will not find ratification. *Coll. Hosp., Inc. v. Superior Court, 8 Cal. 4th 704, 726, 34 Cal. Rptr. 2d 898, 882 P.2d 894 (1994).*

> Ratification is a question of fact. The burden of proving ratification is upon the party asserting its existence. But ratification may be proved by circumstantial as well as direct evidence. Anything which convincingly shows the intention of the principal to adopt or approve the act in question is sufficient. . . . It may also be shown by implication. . [*25] . . [W]here an agent is authorized to do an act, and he transcends his authority, it is the duty of the principal to repudiate the act as soon as he is fully informed of what has been thus done in his name, . . . else he will be bound by the act as having ratified it by implication.

Streetscenes v. ITC Entm't Group, Inc., 103 Cal. App. 4th 233, 242, 126 Cal. Rptr. 2d 754 (2002) (citation and quotation marks omitted).

Starbucks argues that there can be no dispute that it repudiated Horton's conduct. To support this argument, Starbucks submits evidence that Marsh, an assistant manager, reminded Horton about Starbucks's dating policy and warned him that he could not date Plaintiff. (SSUF PP 22, 24.) Further, when Horton denied dating Plaintiff, Marsh told him that he could be fired if Starbucks found out that he was lying. (Starbucks's Reply 20:13-18; SSUF PP 29-31.) According to Starbucks, this evidence supports a finding that Starbucks repudiated Horton's conduct.

Plaintiff disputes Starbucks's position that its actions were reasonable, and provides sufficient evidence to support a reasonable finding that Starbucks ratified Horton's conduct. After Nobel learned that Horton and Plaintiff were having sex, Plaintiff [*26] was transferred to another Starbucks store. But it is not clear that Starbucks "fully investigate[d]" the situation or "repudiate[d] Horton's conduct by redressing the harm done and punishing or discharging [him]." *Fisher, 214 Cal. App. 3d at 621.* As Plaintiff establishes, no formal investigation occurred, and Horton was not fired, demoted, or formally reprimanded for his conduct. Further, Starbucks's argument in its Reply reinforces Plaintiff's argument that Starbucks's did not properly address the situation between Plaintiff and Horton. Starbucks still believes that Horton's "violation of Penal Code *section 261.5* was a matter for the police, not Starbucks." (Starbucks's Reply 17:22-23.)

Under these circumstances, a triable issue of fact exists concerning whether Starbucks ratified Horton's conduct. Plaintiff's claims against Starbucks for assault, battery, and intentional infliction of emotional distress will not be dismissed.

2.3 Plaintiff's Claim for Gender Violence

Plaintiff asserts a claim for "gender violence" against Starbucks under *California Civil Code section 52.4* ("*Section 52.4*"). Again, this claim is made under a theory that Starbucks ratified Horton's conduct. But *Section 52.4(d)* [*27] states, "[n]otwithstanding any other laws that may establish the liability of an employer for the acts of an employee, this section does not establish any civil liability of a person because of his or her status as an employer, unless the employer personally committed an act of gender violence." This language shows that Starbucks may not be liable for gender violence under a ratification theory.

Plaintiff disagrees. She argues that "[a]n employer is considered to have personally committed an act of gender violence, however, if it ratifies the gender violence committed by one of its employees." (OSM 23:4-5.) To support this argument, Plaintiff cites a statement in *Fretland v. County of Humboldt, 69 Cal. App. 4th 1478, 1489-90, 82 Cal. Rptr. 2d 359 (1999)*, a case not involving *Section 52.4* that "an employer can be held civilly liable as a joint participant in assaultive conduct committed by its employee pursuant to the doctrine of ratification."

Plaintiff's argument is not persuasive. The statement in *Fretland* that an employer may be "*held civilly liable . . . for assaultive conduct*" under the doctrine of ratification does not mean that an employer who ratifies an act of gender violence "*personally committed*" [*28] the act as required by *Section 52.4*.

Section 52.4 does not permit Plaintiff's gender violence claim against Starbucks, and that claim will be dismissed.

2.4 Plaintiff's Claims for Sexual Harassment

Plaintiff asserts two claims related to sexual harassment, including a claim for violation of *California Civil Code section 51.9* ("*Section 51.9*") and a claim for hostile work environment sexual harassment under California's Fair Employment and Housing Act ("FEHA").

Starbucks argues that "*Section 51.9* does not apply to workplace harassment." (Starbucks's Mot. 2:7.) Plaintiff does not oppose the Motion concerning the claim for violation of *Section 51.9*, so this claim will be dismissed.

Starbucks next argues that Plaintiff's claim for hostile work environment sexual harassment should be dismissed because "(1) Starbucks cannot be liable for sexual conduct that occurred in a non-work-related context[,] and (2) the only work-related conduct that Plaintiff has identified was welcomed by her and does not, in any event, rise to the level of severity and pervasiveness necessary to create a hostile work environment." (Starbucks's Mot. 2:7-11.) Starbucks's arguments are not persuasive.

Under the FEHA, employers [*29] are liable for damages that an employee incurs due to another employee's sexual harassment. *See Doe v. Capital Cities, 50 Cal. App. 4th 1038, 1046, 58 Cal. Rptr. 2d 122 (1996)* (citing *Cal Gov. Code § 12940(j)(1)*). But the employee must be acting in the scope of the employment relationship for this rule to apply. *Capitol City Foods, Inc. v. Superior Court, 5 Cal. App. 4th 1042, 1047-48, 7 Cal. Rptr. 2d 418 (1992).*

> Whether an employee is acting within the scope of his employment is generally a question of fact; however, if the undisputed evidence would not support an inference that the employee was acting

> within the scope of his employment, it becomes a question of law. . . . The scope of employment is viewed broadly and may cover acts outside the ultimate object of employment; the employer is not liable, however, if the employee substantially departs from his duties for purely personal reasons.

Id. at 1048.

Starbucks relies heavily on *Capitol City Foods* and summarizes the relevant facts of that case well:

> [T]he plaintiff sued for harassment, claiming that she had been told by her supervisor to get into his car and accompany him to his residence. . . . She admitted that she never objected. . . . Once at his residence, she claimed [*30] that he raped her. . . . On appeal from summary judgment for the employer, the Court of Appeal affirmed, holding that the employer was not liable for the alleged rape. . . . The undisputed evidence established that the plaintiff had met and gone with the supervisor willingly, and did not object until she was at his house. . . . This was true even though the supervisor set up the 'date' at work, she was wearing her work uniform, and the supervisor used his authority to excuse her from work so she could leave with him.

(Starbucks's Mot. 16:16-25.) Starbucks argues that "[w]hat destroyed the connection between the rape and workplace in *Capital City Foods* were the acts the plaintiff did voluntarily, *i.e.* going with the rapist. Likewise, Plaintiff's choice to go voluntarily with Horton to places where they had sex destroys any connection between the sex and the workplace." (Starbucks's Mot. 17:1-4.)

Starbucks's logic is faulty. It's true that the plaintiff's voluntary acts destroyed the connection with the workplace in *Capital City Foods.* But there is an issue of fact in this case concerning whether Plaintiff's acts with Horton were voluntary. To be sure, they were voluntary in the sense [*31] that he did not physically force her to do anything. But as the Court discusses in Section 1.2, a reasonable jury could find that Plaintiff's acquiescence to Horton's advances resulted from his manipulation and coercion, and not Plaintiff's willing consent. Since a reasonable jury could also find that this manipulation and coercion stemmed directly from Horton's role as Plaintiff's supervisor, a sufficient connection with the workplace is established, and Starbucks's analogy to *Capital City Foods* fails.

Starbucks also quotes a California appellate case which states that "[t]he employer is not strictly liable for a supervisor's acts of harassment resulting from a completely private relationship unconnected with the employment and not occurring at the workplace or during normal work hours." *Myers v. Trendwest Resorts, Inc., 148 Cal. App. 4th 1403, 1421, 56 Cal. Rptr. 3d 501 (2007)* (emphasis added). But here, Starbucks cannot conclusively show that the relationship between Plaintiff and Horton is unconnected with their employment. *See Doe v. Capital Cities, 50 Cal. App. 4th 1038, 1048, 58 Cal. Rptr. 2d 122 (1996)* (while "the offending conduct may and often does occur at the place of work, it need not. Unwelcome sexual conduct perpetrated [*32] by an agent, supervisor, or coworker, which occurs elsewhere but is in some fashion work-related also constitutes sexual harassment within the meaning of the Act.").

Starbucks also argues that Plaintiff's claim for sexual harassment must fail because Plaintiff cannot "show that the harassment 'was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment . . . .'" (Starbucks's Mot. 20:19-21 (quoting *Fisher, 214 Cal. App. 3d at 608*)). Under the circumstances, the Court finds that triable issues of fact exist concerning this argument.

Plaintiff's claim for hostile work environment sexual harassment survives summary judgment.

2.5 Plaintiff's Claim for Failure to Prevent Sexual Harassment

Starbucks next argues that Plaintiff's claim against it for failure to prevent sexual harassment should be dismissed because "Plaintiff deliberately chose to hide her relationship and declined to use the available measures that Starbucks had in place to prevent harassment." (Starbucks's Mot. 2:13-15.) Further, Starbucks urges, "once Starbucks learned of the relationship, it separated Plaintiff and Horton, which would have ended any harassment (if any had [*33] occurred), but for Plaintiff's decision to continue seeing Horton in secret." (Starbucks's Mot. 2:15-17.)

Plaintiff responds that "[t]riable issues of material fact exist regarding whether Starbucks breached its obligation to take all reasonable steps necessary to prevent harassment from occurring." (OSM 20:26-27.) According to Plaintiff, Starbucks knew about her sexual relationship with Horton and "breached its duty to take all reasonable steps to prevent" the ongoing sexual relationship between Plaintiff and Horton. (OSM 21:11-12.) More specifically, Plaintiff asserts that Starbucks "conducted no investigation, did not discipline Horton, continued to employ Horton, and took no steps to try to ensure that Horton had no further contact with Doe."

(OSM 21:12-16.) The Court agrees with Plaintiff that triable issues of fact exist concerning her claim for failure to take reasonable steps to prevent sexual harassment.

Under California law, it is unlawful "[f]or an [*34] employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring." *Cal. Gov't Code § 12940(k)*. To prevail on a claim under *Section 12940(k)*, Plaintiff must establish (1) that she was sexually harassed, and (2) that Starbucks did not take reasonable steps to prevent harassment. *Id.* The Court found in Section 2.4 that there is a triable issue of fact concerning whether Plaintiff was sexually harassed, so Plaintiff satisfies the first requirement. But Starbucks also disputes whether Plaintiff can meet the second requirement.

Starbucks argues that it took reasonable steps to prevent harassment because it "had an Anti-Harassment Policy in place throughout Plaintiff's employment and avenues by which she could complain about alleged harassment. Plaintiff, however, used none of those procedures and kept her relationship secret from Starbucks . . . ." (Starbucks's Mot. 21:20-24.) While this argument might be a strong one at trial, it does not compel dismissal of Plaintiff's claim on summary judgment.

Section 12940(k) requires that [*35] an employer take all reasonable steps necessary to prevent harassment. In an analogous Title VII situation, the Ninth Circuit has held that "[o]nce an employer knows or should know of harassment, a remedial obligation kicks in. That obligation will not be discharged until action - prompt, effective action - has been taken. Effectiveness will be measured by the twin purposes of ending the current harassment and deterring future harassment - by the same offender or others." *Fuller v. City of Oakland, 47 F.3d 1522, 1528 (9th Cir. 1995)* (citations omitted). "The affirmative and mandatory duty to ensure a discrimination-free work environment requires the employer to conduct a prompt investigation of a discrimination claim." *Am. Airlines, Inc. v. Superior Court, 114 Cal. App. 4th 881, 890, 8 Cal. Rptr. 3d 146 (2003), reh'g denied and review denied 2004 Cal. App. LEXIS 147 (2004)*.

Here, Plaintiff's evidence concerning Starbucks's investigation is sufficient to defeat summary judgment on Plaintiff's claim for failure to prevent harassment.

2.6 Plaintiff's Claim for Constructive Discharge

Starbucks argues that Plaintiff's claim against it for constructive discharge fails. The Court agrees.

"Constructive discharge occurs when the employer's [*36] conduct effectively forces an employee to resign." *Turner v. Anheuser-Busch, Inc., 7 Cal. 4th 1238, 1244, 32 Cal. Rptr. 2d 223, 876 P.2d 1022 (1994)*.

> The conditions giving rise to the resignation must be sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer. The proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee."

Id. at 1246.

Here, Plaintiff quit working at Starbucks and was sent out of state to receive treatment for her mental and emotional problems. But the undisputed testimony shows that Plaintiff enjoyed working at Starbucks and did not want to quit. (Doe Depo. 103:7-104:17.) Since Plaintiff wanted to continue working, no reasonable juror could find that work conditions were "sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer." *Turner, 7 Cal. 4th at 1246.* Even if pulling Plaintiff away from her job to send her to out of state was a "rational option," Plaintiff's [*37] resignation was not coerced by Starbucks. *Id.* Plaintiff argues that she "had to resign her employment in order to end Horton's sexual abuse," (OSM 24:8), but this argument is too attenuated to show that Starbucks had "sufficiently extraordinary and egregious" work conditions to support a claim for constructive discharge, *Turner, 7 Cal. 4th at 1246.*

Plaintiff's claim for constructive discharge against Starbucks fails.

2.7 Plaintiff's UCL Claim

Starbucks argues that Plaintiff's claim against it under the UCL must fail because "Plaintiff cannot obtain either injunctive relief or restitution under the UCL[,]" and "these are the only remedies the UCL provides . . . ." (Starbucks's Reply 23:24-27.) The Court agrees.

Plaintiff argues that restitution is appropriate because "Starbucks should be forced to disgorge the profits it obtains by exploiting minor employees and ignoring its duty to investigate sexual harassment." (OSM 23:19-21.) The UCL's provision for restitution allows individuals to "recover profits unfairly obtained to the extent that these profits represent monies given to the defendant or benefits in which the plaintiff has an ownership interest." *Korea Supply Co. v. Lockheed*

Martin Corp., 29 Cal. 4th 1134, 1150, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003). [*38] Restitution "compel[s] a UCL defendant to return money obtained through an unfair business practice to those persons in interest from whom the property was taken, that is, to persons who had an ownership interest in the property or those claiming through that person." *Kraus v. Trinity Mgmt. Servs., Inc., 23 Cal. 4th 116, 126-27, 96 Cal. Rptr. 2d 485, 999 P.2d 718 (2000).* Here, it is undisputed that Plaintiff is not seeking the return of money that she has given to Starbucks. Accordingly, her request for restitution is inappropriate.

Plaintiff's request for an injunction similarly fails. "[T]he general rule is that an injunction may not issue unless the alleged misconduct is ongoing or likely to recur . . . ." *Madrid v. Perot Sys. Corp., 130 Cal. App. 4th 440, 467, 30 Cal. Rptr. 3d 210 (2005).* Here, as Starbucks says, "[t]he alleged wrongdoing in this case involves Plaintiff's relationship with Horton, but neither of them are currently employed by Starbucks[, so] [t]he alleged wrongdoing, therefore, cannot recur." (Starbucks's Reply 24:8-11.) Further, Plaintiff provides no evidence that this type of misconduct is widespread at Starbucks or took place in any case other than hers. Thus, the Court finds that injunctive relief is unavailable.

Since [*39] the only relief the UCL provides is unavailable here, Plaintiff's UCL claim fails.

2.8 Plaintiff's Request for Punitive Damages

Starbucks argues that Plaintiff's request for punitive damages must fail. The Court agrees.

Punitive damages may be recovered against a corporate employer if one of its officers, directors, or managing agents "had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice." *Cal. Civ. Code § 3294(b).* A plaintiff must identify someone who "exercises substantial discretionary authority over decisions that ultimately determine corporate policy." *White v. Ultramar, Inc., 21 Cal. 4th 563, 573, 88 Cal. Rptr. 2d 19, 981 P.2d 944 (1999).*

In this case, Plaintiff has not identified any such person from Starbucks. Plaintiff's own argument implies that no officer, director, or managing agent was involved in this case. Plaintiff asserts that "Starbucks cannot insulate itself by claiming that all of the company's actions were through lower level employees -- it chose to handle the allegation through [*40] such employees, and chose to ignore the sexual abuse of one of its minor employees . . . ." (OSM 25:18-22.) But Plaintiff fails to identify anyone at Starbucks who "exercise[d] substantial discretionary authority over decisions that ultimately determine corporate policy." *White, 21 Cal. 4th at 573.*

Accordingly, there is no triable issue of fact concerning punitive damages, and Plaintiff's request for punitive damages fails.

2.9 Conclusion

Starbucks's Motion is GRANTED IN PART and DENIED IN PART.

3. HORTON'S MOTION

3.1 Plaintiff's Claim for Intentional Infliction of Emotional Distress

Horton argues that Plaintiff's claim against him for intentional infliction of emotional distress must fail. The Court disagrees.

In California, a plaintiff may make a prima facie showing of intentional infliction of emotional distress by establishing "(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard [for] the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." *Bosetti v. U.S. Life Ins. Co., 175 Cal. App. 4th 1208, 1241-42, 96 Cal. Rptr. 3d 744 (2009)* [*41] (internal quotation marks omitted and brackets in original). Horton argues that Plaintiff fails to meet each of these elements. The Court will discuss each element in turn.

3.1.1 Extreme and Outrageous Conduct

Horton argues that he has not engaged in extreme and outrageous conduct. He states that "[a] sexual relationship between a 24 year old male and a very sexually experienced 16 year old female, while ill-advised, is not so extreme as to exceed all bounds usually tolerated in a civilized community." (Horton Mot. 15:10-13.) Plaintiff argues that whether Horton's conduct was extreme and outrageous is a fact issue, and the Court agrees. It was certainly more than "ill-advised."

One California Court of Appeal has held that

> reasonable minds could certainly differ whether it is beyond the bounds of conduct to be tolerated in civilized society for a 48-year-old medical doctor to initiate and conduct an extended sexual relationship with a minor while encouraging her to break the law by providing her with alcohol and controlled substances and paying her to purchase such substances for him.

Angie M. v. Superior Court, 37 Cal. App. 4th 1217, 1226, 44 Cal. Rptr. 2d 197 (1995). While Horton is much younger than the defendant [*42] in *Angie M.*, this difference does not defeat Plaintiff's argument. Horton was eight years older than Plaintiff, and in a position to exert significant influence over her. He supplied her with drugs and alcohol and repeatedly engaged in illegal sexual activity with her. A reasonable jury could find that this conduct was extreme and outrageous.

3.1.2 Intent to Cause or Reckless Disregard for Extreme Emotional Distress

Horton argues that he did not intend to inflict extreme emotional distress on Plaintiff or recklessly disregard the probability that such distress might occur. While Horton might certainly be correct, this is again more properly an issue for a jury to consider. *Angie M., 37 Cal. App. 4th at 1226.*

3.1.3 Suffering of Extreme Emotional Distress

Horton avoids arguing that Plaintiff has not suffered extreme emotional distress. Such an argument would fail, since there is ample evidence that Plaintiff has experienced severe emotional problems. Rather, Horton argues that he was not the cause of Plaintiff's distress. According to Horton, a "series of [Plaintiff's] antecedent and contemporaneous relationships, the pre-existing conditions that drove her to compulsive sexual activity, [*43] speak to a disordered personality that objectively was not the result of Horton's conduct." (Horton Reply 19:4-7.) This is yet another issue for a jury to decide.

Plaintiff presents evidence that Horton caused her distress. For example, she submits the testimony of her therapist that Plaintiff was diagnosed "as having been sexually abused by Horton, causing her severe damage, evidenced by a sense of self loathing, low self esteem, loss of hope and other issues." (PSMF P 64.) While Horton submits evidence tending to show that Plaintiff suffered severe mental and emotional problems before their relationship, this evidence does not compel summary judgment. While Plaintiff might have been troubled before meeting Horton, Plaintiff submits evidence that Horton caused her to experience severe emotional distress.

Plaintiff's claim against Horton for intentional infliction of emotional distress survives summary judgment.

3.2 Plaintiff's Claim for Sexual Battery

Horton argues that Plaintiff's claim against him for sexual battery must be dismissed. To establish a claim for sexual battery, a plaintiff must show that "the batterer intend[ed] to cause a harmful or offensive contact and the batteree [*44] suffered a sexually offensive contact." *Jacqueline R. v. Household of Faith Family Church, Inc., 97 Cal. App. 4th 198, 208, 118 Cal. Rptr. 2d 264 (2002)* (quotation marks omitted). Under this standard, Horton argues that Plaintiff consented to the contact he had with her, and that the contact was not intended to be or actually offensive. (Horton's Mot. 17:5-7.) Plaintiff responds that, "even if Doe could have legally consented to sex with Horton, the evidence shows that the sexual contact was unwelcomed by Doe, that she did not consent, and that Doe was coerced into engaging in sexual acts with Horton, raising a triable issue of material fact." (Opposition to Horton's Motion 14:24-27.) The Court agrees with Plaintiff that a triable issue of fact exists.

As established in Section 1.2, Defendants cannot show as a matter of law that Plaintiff consented to Horton's conduct. Further, the Court recognized that there is enough evidence to support Plaintiff's assertion that Horton coerced and manipulated her into having sex with him. Thus, there is at least an issue of fact concerning whether Horton's conduct was offensive, and there is no doubt that Horton intended to cause this contact.

Thus, this claim for sexual [*45] battery survives summary judgment.

3.3 Plaintiff's Claim for Assault

Horton next attacks Plaintiff's claim against him for assault. He argues that this claim should fail because, when Plaintiff's engaged in sexual acts with Horton, she did not "reasonably believe that [s]he was about to be touched in a harmful or offensive manner." *See California Jury Instructions -- Civil § 1301* (June 2009 Ed.) The Court disagrees. Plaintiff provides evidence that she was offended by Horton's sexual conduct with her, and that his contact with her caused her damage. (*See, e.g.*, PSMF P 64.) Though Plaintiff's evidence is contradicted by other evidence submitted by the parties, Plaintiff's submissions need not be undisputed. Her evidence is sufficient to create a triable issue of fact, and her claim for assault survives summary judgment.

3.4 Plaintiff's Claim for Violation of Civil Code *Section 51.9*

Horton argues that Plaintiff's claim for sexual harassment in violation of Civil Code *Section 51.9* must be dismissed, and Plaintiff does not rebut this argument. Thus, this claim fails.

3.5 Plaintiff's Claim for Gender Violence

Plaintiff asserts a claim against Horton for gender violence under *California Civil Code section 52.4*. [*46] Horton argues that Plaintiff's evidence cannot satisfy the definition of gender violence. But gender violence includes "[a] physical intrusion or physical invasion of a sexual nature under coercive conditions, whether or not

those acts have resulted in criminal complaints, charges, prosecution, or conviction." *Cal Civ. Code § 52.4(c)(2)*. Since the Court has held that there is a triable issue of fact concerning whether Plaintiff was coerced into a sexual relationship with Horton, Plaintiff's claim for gender violence survives.

3.6 Plaintiff's Claim for Workplace Sexual Harassment

Horton's arguments concerning Plaintiff's claim for workplace sexual harassment are based on his contention that Plaintiff consented to sexual conduct with him. But as the Court established in Section 1.2, there is a triable issue of fact concerning whether such consent existed. Thus, Plaintiff's workplace sexual harassment claim survives Horton's Motion.

3.7 Plaintiff's Claim for Failure to Take Steps to Prevent Sexual Harassment

Horton argues that Plaintiff's claim against him for failure to take steps to prevent sexual harassment should be dismissed because there is no evidence that Horton was Plaintiff's employer. [*47] (Horton Reply 23:11-12.) Horton is correct, and this claim fails.

3.8 Plaintiff's Claim for Negligence

Horton argues that Plaintiff's claim for negligence should be dismissed because she has not submitted competent evidence that he caused her damages. But as established in Section 3.1.3, Plaintiff has provided sufficient evidence on this issue to withstand summary judgment. Thus, Plaintiff's negligence claim survives.

DISPOSITION

Starbucks's Motion is GRANTED IN PART and DENIED IN PART. Horton's Motion is GRANTED IN PART and DENIED IN PART.

IT IS SO ORDERED.

DATED: December 18, 2009

/s/ Andrew J. Guilford

Andrew J. Guilford

United States District Judge

McGinest v. GTE Service Corp. (2004 9th Cir.) 360 F.3d 1103

360 F.3d 1103, *; 2004 U.S. App. LEXIS 4632, **;
93 Fair Empl. Prac. Cas. (BNA) 557; 84 Empl. Prac. Dec. (CCH) P41,614

GEORGE MCGINEST, Plaintiff-Appellant, v. GTE SERVICE CORP.; MIKE BIGGS, Defendants-Appellees.

No. 01-57065

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

360 F.3d 1103; 2004 U.S. App. LEXIS 4632; 93 Fair Empl. Prac. Cas. (BNA) 557; 84 Empl. Prac. Dec. (CCH) P41,614

December 2, 2002, Argued and Submitted, Pasadena, California
March 11, 2004, Filed

SUBSEQUENT HISTORY: Related proceeding at *McGinest v. GTE Service Corp., 2004 Cal. App. LEXIS 1394 (Cal. App. 2d Dist., Aug. 6, 2004)*
Appeal after remand at *McGinest v. GTE Serv. Corp., 2007 U.S. App. LEXIS 21304 (9th Cir. Cal., Aug. 30, 2007)*

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Central District of California. D.C. No. CV-99-13432-CAS. Christina A. Snyder, District Judge, Presiding.

DISPOSITION: Affirmed in part, reversed in part, and remanded.

COUNSEL: David A. Cohn, Mancini & Associates, Encino, California; Gerald M. Serlin, Benedon & Serlin, Woodland Hills, California, for the plaintiff-appellant.

Jennifer L. Nutter and Thomas P. Brown IV, Epstein, Becker & Green, Los Angeles, California, for the defendant-appellee.

JUDGES: Before: Stephen Reinhardt, Diarmuid F. O'Scannlain, and Richard A. Paez, Circuit Judges. Opinion by Judge Paez; Partial Concurrence and Partial Dissent by Judge O'Scannlain.

OPINION BY: Richard A. Paez

OPINION

[*1106] PAEZ, Circuit Judge:

George McGinest, an African-American employee of GTE Service Corporation ("GTE"), sued GTE under *Title VII* for creation of a racially hostile work environment, failure to promote due to racial discrimination, and failure to promote due to retaliation. McGinest claims that GTE created a racially hostile work environment based both upon its perpetration of and its failure to adequately respond to a large number of incidents that occurred over a fifteen year period. In support of his hostile work environment claim, McGinest alleges [**2] that he was placed in dangerous working conditions because of his race, prevented from collecting bonus pay available to non-African-American coworkers, forced to endure racial taunts and insults by supervisors and coworkers, and subjected to racist graffiti in GTE's bathrooms and on switch boxes. Additionally, McGinest claims that he was denied a promotion in late 1998 due to his race and in retaliation for filing an EEOC complaint; GTE responds that it was unable to promote him due to a hiring freeze.

The district court granted summary judgment to GTE. The court found that the incidents comprising the hostile work [*1107] environment claim were sporadic, and for the most part adequately remedied. Moreover, it found that McGinest was unable to produce sufficient evidence that GTE's stated reason for failing to promote him was a pretext.

We reverse the district court's dismissal of the hostile environment and disparate treatment claims. The district court resolved numerous factual questions in favor of GTE, failed to distinguish between supervisors and coworkers in evaluating GTE's liability, and did not consider fully the cumulative impact of the events that occurred. Because McGinest has [**3] established genuine material issues of fact regarding his hostile work environment claim, as well as on the question of whether the denial of the promotion was prompted by a discriminatory motive, these claims must be remanded. However, McGinest has failed to establish a prima facie

case of retaliation, and so we affirm the district court's dismissal of this claim.

I.

BACKGROUND

George McGinest is an African-American employee of GTE, a telecommunications company. [1] He has worked for GTE for 23 years, and has continued to do so during the course of this litigation. McGinest was initially hired as a lineman, and subsequently has worked as an outside plant construction worker and relief supervisor. At the GTE facilities at which McGinest has worked, he has been one of few African-American employees. Because this case was decided on summary judgment, we evaluate the facts in the light most favorable to McGinest, the nonmoving party. *Lam v. Univ. of Hawaii, 40 F.3d 1551, 1555 n.2 (9th Cir. 1994).*

1 Although GTE is now owned by Verizon, we continue to refer to it by the name under which it was sued.

[**4] **A. Hostile Work Environment**

McGinest describes a number of events and practices, which he alleges cumulatively created a hostile work environment. These events fall roughly into two categories: some involved discriminatory treatment through concrete actions, while others involved written and oral derogatory statements.

1. *Concrete Actions*

Events Involving Supervisor Jim Noson

Jim Noson supervised McGinest for five or six years, at a facility in Long Beach, ending in the early 1990s. During this time, Noson engaged in numerous acts of racial harassment directed toward McGinest. Although the majority of these incidents were not accompanied by explicit racial comments, McGinest testified at his deposition that Noson's behavior and "any comment that he made was because of my race." According to McGinest, Noson forced McGinest to work under dangerous conditions or without proper equipment, and subjected him to obscene and demeaning language. When McGinest was responsible for a project, Noson would not provide him with sufficient crew members to safely perform the job. Noson also indicated his desire to fire McGinest on several occasions, and specifically [**5] stated that he wished to provoke McGinest into fighting with another worker so that he could fire both of them. On one occasion, Noson noted that McGinest was wearing a gold chain, and commented "only drug dealers can afford nice gold chains."

[*1108] Noson's abusive conduct was also aimed at Matt Ketchum, a white coworker and friend of McGinest. McGinest testified that although Ketchum "received the blunt of the problem too, it still was directed to me because of my race. . . . 90 percent of time, if he wasn't [] with me, he wouldn't receive the same bashing."

Any time that McGinest had a problem with Noson he gave notes complaining about Noson's conduct to his supervisor, Hank Bisnar, and complained in person. Because McGinest's complaints were not successful in remedying the problem, McGinest ultimately filed an internal discrimination complaint noting twelve incidents where Noson had treated him in a discriminatory manner. GTE claims that it conducted an internal investigation, finding Noson's comments to be merely "shoptalk," but requiring Noson to apologize to McGinest. However, McGinest states that he never received a response to his complaint.

Overtime for Relief Supervisors

[**6] From 1995 to 1997, non-African-American relief supervisors received overtime pay when they arrived early to set up for their shift. On some occasions, relief supervisors were permitted to claim an entire hour of overtime when they arrived just five minutes early to set up for their shift. GTE acknowledges that until the arrival of the new manager, Mike Begg, there was an unwritten rule that relief supervisors got an hour of overtime for each shift. McGinest testified that even after Begg's arrival, some supervisors continued to get "bonus" overtime pay, however, McGinest's supervisor, Don Roberts, refused to allow him to claim any of the overtime that he actually worked when he was a relief supervisor. McGinest challenged this differential treatment for several paychecks, submitting timesheets that reflected the overtime that he worked, only to have the overtime removed by Roberts. McGinest complained repeatedly about this treatment.

Coworkers' Refusal to Obey When McGinest Was Relief Supervisor

In 1995, McGinest moved from the Long Beach facility to Huntington Beach. Upon his arrival, he had difficulties with coworkers who refused to work under his supervision when he was [**7] the relief supervisor. On one occasion, several workers refused to work for him in carrying out a job that was extremely dirty and undesirable. Brian Brand, a white coworker, testified that they also refused to work for him on the same occasion. McGinest did not complain to management about this incident.

Maintenance of Vehicles

In March of 1997 McGinest became concerned that one of the tires on his company vehicle was wearing out. Since ninety percent of his driving time was on the

freeway, he was concerned for his safety. He sent a request in writing to the garage to have the tire replaced, but the garage mechanic replied that there was nothing wrong with the tire. He also informed his supervisor, Don Roberts, about the need to replace the tire, but Roberts said that "the company wouldn't spend any money on any tires." After McGinest's request for repair was denied, he showed the tire to another supervisor, who agreed that the tire looked bald.

Two to three weeks after these events, the tire blew out while McGinest was driving the vehicle and he crashed into a wall. McGinest was treated for injuries at the hospital. His leg was injured and he had to wear a neck brace.

[**8] McGinest testified that almost everyone was driving around in vehicles with better tires. He explained that when white employees "want[] something fixed, they get it," and cited an example of a white employee [*1109] who had requested new tires around the same time that McGinest had, but who had obtained them. Another coworker, Brand, agreed that the garage mechanic and the foreman seemed to have a particular problem with three black employees, one of whom was McGinest, noting that they "continuously treated George [McGinest] in a de[]meaning and [condescending] manner in my presence." Brand testified that "for the most part they seemed to be pretty good with myself, and [others] . . . we happen to be white, it could have been racial. It could have been just personality."

2. *Racial Slurs and Derogatory Comments*

Derogatory Statement by Coordinator Tom Hughes

In May 1996, Tom Hughes called McGinest "stupid nigger" to his face, an epithet that was overheard by Brand. Hughes had referred to McGinest on other occasions as "stupid" and "sparrow brain," and had told McGinest, "you should stay in Long Beach where you belong, with your kind."

McGinest did not report [**9] the May 1996 incident immediately because he was so enraged that he had to leave the building. The next day, McGinest reported to his immediate supervisor, Gary Deason, that Hughes was "always calling me a name." However, he did not pursue a formal complaint with the management because of his conviction that it would be futile, "because I went to management with several different things and nothing changed, over and over again."

Rather, McGinest filed a complaint with the EEOC. Upon receiving a call from the EEOC in July 1997, human resources manager Jeff Nakamura began an investigation of the incident. Nakamura found Hughes's denial that this comment occurred plausible. Based on this belief and the EEOC's refusal to provide him with the name of the witness, Nakamura did not pursue the investigation. Nakamura testified that he waited two years to reinitiate the investigation "because in the meantime I thought the agency would be cooperative by sharing with me the name of the witness so I could do a thorough investigation." Once Nakamura did reopen the investigation, he learned the name of the witness by interviewing several employees. After Brand, the witness, confirmed that the epithet [**10] had been used, Nakamura determined that disciplinary action should be taken despite Hughes's continued denial. Hughes was counseled against using such words, shown a video on *sexual* harassment, and received a disciplinary memo. [2] There is no allegation that Hughes engaged in any further objectionable conduct following this discipline.

2 The memorandum read in full:

> On June 15, 1999, an investigation was held with you regarding a racial statement you supposedly made to another employee.
>
> Upon the conclusion of this investigation, which showed your failure to adhere to Company policy, I have no alternative but to issue this disciplinary memorandum.
>
> You will be reviewed on the Company's policy regarding GTE's Equal Employment Opportunity, Affirmative Action and Workforce Diversity. Any further violations of this nature could result in your termination from GTE Network Services.
>
> This disciplinary memorandum will be removed if you have no further violations for a period of one year.
>
> I am confident that you will succeed in your efforts. If I can be of any assistance, please feel free to see me.

[**11] *Comment by Supervisor Ledbetter*

McGinest and Brand testified that in January 1997 Paul Ledbetter, a supervisor, was frustrated that McGinest and his crew were not able to perform a work [*1110] assignment immediately. They quoted him as saying, "The other colored guy who used to work here would jump when I said it. It is a damn shame how it's gone downhill." McGinest reported this incident to management. GTE claims that Ledbetter no longer worked at GTE in 1997.

Comments by Coworkers

On one occasion, coworker Alex Talmadge said, referring to McGinest, "I'll retire before I work for a Black man." Another coworker, Jim Frick, said of McGinest, "I refuse to work for that dumb son of a

bitch." McGinest complained about these incidents to Roberts and Begg.

In 1996 and 1997, McGinest's coworker Daniel DeLeon called Ketchum "Aunt Jemima" numerous times in the presence of McGinest. DeLeon also referred to McGinest as Ketchum's "mammy" on a number of occasions. McGinest and a black coworker note that the phrase "Aunt Jemima" is a racial insult, connoting laziness and servitude. Although Ketchum is white, McGinest explained that the comment was intended to irk McGinest, and was [**12] directed at Ketchum because he is friends with black employees.

McGinest requested that DeLeon not use this phrase because he found it racist, but was told "fuck you" in response. McGinest reported the comment both to manager Mike Begg and to supervisor Roberts, who supervised McGinest and DeLeon, but was unaware if any disciplinary action was taken. Human resources manager Nakamura was apparently unaware of this incident until the phone call from the EEOC representative. Following the call, Nakamura questioned DeLeon. DeLeon claimed that he did not intend "Aunt Jemima" as a racial insult, but rather as a teasing nickname referring to a commercial that emphasized the slowness with which the syrup poured out of the bottle. Ketchum also apparently had a nickname for DeLeon, "Biscuit." Nakamura testified that he found DeLeon's explanation plausible, but nonetheless instructed DeLeon to stop using the phrase. [3] There is no allegation that DeLeon continued to use the phrase subsequently.

> 3 GTE notes that DeLeon is originally from Cuba, and hence may have been unaware that this phrase is a racial insult, although he has been in the United States for over 20 years. DeLeon's explanation is somewhat less believable in light of his uncontested use of the clearly racial phrase "mammy." Moreover, McGinest testified that DeLeon was "a very intelligent person, and he . . . understood exactly what he was saying, and he was being racist."

[**13] *Racist Graffiti*

McGinest saw racist graffiti on the walls of the men's rest-room and in the stalls on multiple occasions. This graffiti included the word "nigger," sometimes altered to "digger," and the phrase "white is right." Other coworkers testified to seeing the phrase "PONTIAC," meaning "poor old nigger thinks it's a Cadillac," [4] and, in December 2000, "nigger go home." Although managers used the same restrooms, the graffiti was not painted over when it appeared and no public action of disapproval was taken.

> 4 Leigh Washington, the African-American coworker who reported seeing this phrase, stated that he complained for weeks before GTE painted it over.

Similar racist graffiti, particularly the word "nigger," also was present in GTE switch boxes and in the blockhouse and garage. A coworker noted that one year during Black History Month the word "Black" was crossed out on a poster and "nigger" was written in its place. The defaced poster displayed this epithet until [*1111] the coworker finally removed [**14] it three weeks later.

McGinest only mentioned this graffiti to management on one occasion, around April 1998. On this occasion, McGinest and a coworker reported to Al Valle that the word "nigger" had appeared in the bathroom, and Valle promptly spraypainted over it. Later, when supervisor Roberts learned about the incident, he said, "Oh well, I guess I'll have to write it again," and then added, "Ah, why can't we all just get along," in reference to a statement made by Rodney King after being beaten by Los Angeles police officers. Roberts may not have been aware of the precise nature of the graffiti at the time of these comments, as there is testimony that he was merely told that it was condescending.

Following this event McGinest "basically stopped using this bathroom . . . because I am offended and disgusted with seeing the "N" word written in the bathroom--I would get upset if I were to see it written." The word "nigger" and other racist graffiti have continued to appear in the bathroom since this incident.

Antidiscrimination Policy

Although GTE claims that it has a "zero tolerance" policy for discriminatory conduct, its written policy, which appears to have been adopted [**15] in 1997, says nothing about zero tolerance or about any ramifications for such conduct. Nor does the written policy detail what steps an employee should follow if the employee feels she or he has been subjected to discriminatory conduct, stating only, "If you have questions concerning equal employment opportunity, discrimination, or affirmative action, discuss them with your supervisor or human resources representative."

B. Failure to Promote

In September 1998, GTE had a vacancy in the position of Outside Plant Construction Installer Supervisor. McGinest applied for this position, which would have been a promotion. He passed the qualifying exam and was interviewed for the position by Begg in October 1998.

According to GTE, McGinest was selected for the position, but when Begg contacted the human resources

department to obtain salary authorization he was informed by Casey Larson that there was a salary/hiring freeze in place. Nakamura testified that the salary freeze was due to GTE's financial difficulties. Consequently, another employee, John Phalen, was moved laterally into the position.

However, GTE was unable to produce any documentation verifying that there was a [**16] salary freeze, and Phalen himself testified that he was unaware that there was a freeze, despite the fact that it was allegedly the reason for his transfer. GTE claims that it is common for salary freezes to be implemented without written notification. The record does not reflect how large an operation GTE was at this time, but at least 175 individuals were employed in the three yards supervised by Begg.

The decision not to promote McGinest occurred approximately a year and a half after McGinest filed his EEOC complaint. McGinest notes that African Americans are underrepresented at GTE, particularly in supervisory positions, and claims that it is difficult for African Americans to advance. In the Huntington Beach yard, where McGinest worked, five or six out of 70 employees were African American, and none were supervisors.

McGinest initially filed a complaint with the EEOC on June 3, 1997. After conducting an investigation, the EEOC determined that the evidence supported a finding that "respondent acted in violation of *Title VII of the Civil Rights Act of 1964*." McGinest filed an additional complaint regarding [*1112] the failure to promote. After the EEOC issued a Right to Sue notice, McGinest [**17] sued GTE and supervisor Mike Begg. The district court granted summary judgment to the defendants as to all claims. McGinest timely appealed the judgment for GTE, but did not appeal the district court's dismissal of his claim against Begg.

II.

DISCUSSION

McGinest alleges that GTE's actions violated his right to be free from invidious discrimination in the workplace. He raises three separate Title VII claims: 1) creation of a racially hostile work environment; 2) failure to promote on account of race; and 3) failure to promote on account of retaliation. We review *de novo* the district court's grant of a motion for summary judgment. *Schnidrig v. Columbia Mach., Inc., 80 F.3d 1406, 1408 (9th Cir. 1996).*

In evaluating motions for summary judgment in the context of employment discrimination, we have emphasized the importance of zealously guarding an employee's right to a full trial, since discrimination claims are frequently difficult to prove without a full airing of the evidence and an opportunity to evaluate the credibility of the witnesses. *See, e.g., Schnidrig, 80 F.3d at 1410-11*; *Lam, 40 F.3d at 1563*; *Sischo-Nownejad v. Merced Community College Dist., 934 F.2d 1104, 1111 (9th Cir. 1991).* [**18] As the Supreme Court has stated, "The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." *Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 81-82, 140 L. Ed. 2d 201, 118 S. Ct. 998 (1998).* As a result, when a court too readily grants summary judgment, it runs the risk of providing a protective shield for discriminatory behavior that our society has determined must be extirpated.

III.

HOSTILE WORK ENVIRONMENT

Under Title VII of the Civil Rights Act of 1964, it is "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race." *42 U.S.C. § 2000e-2(a)(1) (2003).* This prohibition encompasses the creation of a hostile work environment, which violates Title VII's guarantee of "the right to work in an environment free from discriminatory intimidation, ridicule, and insult." *Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1986).* [**19] "Courts have long recognized that a workplace in which racial hostility is pervasive constitutes a form of discrimination." *Woods v. Graphic Communications, 925 F.2d 1195, 1200 (9th Cir. 1991).*

In order to survive summary judgment, McGinest must show the existence of a genuine factual dispute as to 1) whether a reasonable African-American man would find the workplace so objectively and subjectively racially hostile as to create an abusive working environment; and 2) whether GTE failed to take adequate remedial and disciplinary action. *Steiner v. Showboat Operating Co., 25 F.3d 1459, 1462-63 (9th Cir. 1994)*; *see also Faragher v. City of Boca Raton, 524 U.S. 775, 787, 141 L. Ed. 2d 662, 118 S. Ct. 2275 (1998).*

A. *Severe or Pervasive Hostile Environment*

In determining if an environment is so hostile as to violate Title VII, we [*1113] consider whether, in light of "all the circumstances," *Nichols v. Azteca Rest. Enters., 256 F.3d 864, 872 (9th Cir. 2001)*, the harassment is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Meritor, 477 U.S. at 67* [**20] (internal brackets and quotation marks removed).

The Supreme Court has followed a "middle path" with regard to the level of hostility or abuse necessary to establish a hostile work environment. *Harris v. Forklift Sys., Inc., 510 U.S. 17, 21, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993)*. Simply causing an employee offense based on an isolated comment is not sufficient to create actionable harassment under Title VII. *Id.* However, the harassment need not cause diagnosed psychological injury. *Id. at 22*. It is enough "if such hostile conduct pollutes the victim's workplace, making it more difficult for her to do her job, to take pride in her work, and to desire to stay on in her position." *Steiner, 25 F.3d at 1463*.

A plaintiff must show that the work environment was both subjectively and objectively hostile. *Nichols, 256 F.3d at 871-72*. Subjective hostility is clearly established in the instant case through McGinest's unrebutted testimony and his complaints to supervisors and to the EEOC. *256 F.3d at 873*.

In evaluating the objective hostility of a work environment, the factors to be considered include the "frequency of discriminatory [**21] conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Nichols, 256 F.3d at 872* (quoting *Harris v. Forklift Sys., 510 U.S. at 23*). "The required level of severity or seriousness varies inversely with the pervasiveness or frequency of the conduct." *Id.* (internal quotation marks omitted). Considering the facts in the light most favorable to McGinest, [5] it is clear that the [*1114] incidents described are sufficient to survive a motion for summary judgment. According to McGinest, he was involved in a serious automobile accident because, due to his race, both his supervisor and garage personnel were unwilling to ensure that his vehicle received necessary maintenance. He was forced to work in dangerous situations and barraged with insults and abuse by, among others, Supervisor Noson. [6] Over a two-year period, he was pre(Text continued on page 3021) vented from collecting overtime pay that he worked. [7] McGinest's ability to [*1115] perform his job was directly affected by the refusal of his coworkers to work under his direction on occasion. [**22]

5 GTE contests McGinest's version of the facts. However, it is axiomatic that disputes about material facts and credibility determinations must be resolved at trial, not on summary judgment. *See, e.g., Lam, 40 F.3d at 1559*. Indeed, the Supreme Court has instructed that at the summary judgment stage, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*. The district court, contrary to these fundamental principles, accepted GTE's allegations that many of the events attested to by McGinest either did not occur as McGinest described or were not racially motivated. For example, although McGinest and others testified that the garage foreperson treated black employees worse than white employees, the district court emphasized one deponent's acknowledgment that the foreperson's animus against the black employees may have been due simply to personality. Similarly, the district court concluded that "there is no credible evidence of a differential application of any 'unwritten rule' regarding relief supervisor overtime." However, in both of these instances McGinest provided detailed deposition testimony describing his personal observations regarding the manner in which African-American employees were disfavored in relation to white employees. This testimony did not consist of mere "conclusory allegations," which would be insufficient to defeat a motion for summary judgment. *Nat'l Steel Corp. v. Golden Eagle Ins. Co., 121 F.3d 496, 502 (9th Cir. 1997)*. Rather, McGinest's testimony would suffice to enable a reasonable trier of fact to conclude that discrimination had occurred, without the need for further corroborating evidence. *See United States v. One Parcel of Real Prop., 904 F.2d 487, 491-92 (9th Cir. 1990)*. At trial, the trier of fact might deem such testimony to lack credibility, and disregard it. However, when ruling on a summary judgment motion, the district court is not empowered to make credibility determinations or weigh conflicting evidence. *Liberty Lobby, Inc., 477 U.S. at 255*; *see also SEC v. Koracorp Indus., Inc., 575 F.2d 692, 699 (9th Cir. 1978)*.

[**23]

6 Whether the allegations regarding Noson are admissible at trial *for purposes of liability* is a close question. The principal case on this issue is *National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 153 L. Ed. 2d 106, 122 S. Ct. 2061 (2002)*; a case the district court did not have the benefit of when it issued its summary judgment ruling.

In *Morgan*, the Court held that "consideration of the entire scope of a hostile work environment claim, including behavior alleged outside the statutory time period, is permissible for purposes of assessing liability, so long as an act contributing to that hostile environment takes place within the statutory time period." *536 U.S. 101, 105, 153 L. Ed. 2d 106, 122 S. Ct. 2061*. As the dissent points out, *Morgan* itself does not offer precise guidance on

how to evaluate whether an act that falls outside the statutory time period can nonetheless be considered for liability purposes. Dissent Op. at 3045, n.2. *Morgan* implies that a previous incident would not be part of the same hostile work environment claim, and therefore time-barred, if it "had no relation to" the later acts, or there was intervening action taken by the employer. *536 U.S. at 118.* Additionally, allegations that would ordinarily be time-barred, but are nonetheless part of a single hostile work environment claim, are still subject to the equitable defenses of waiver, estoppel, and equitable tolling. *536 U.S. at 121.*

Here, viewing the evidence in the light most favorable to McGinest, it is possible that the events concerning Noson in the early 1990s are "part of one unlawful employment practice" giving rise to a "single claim." *536 U.S. at 118.* Noson's harassment spanned several years ending in the early 1990s, involving, among other things, a thinly-veiled racially derogatory comment. While the dissent places reliance on the fact that GTE did ask Noson to apologize to McGinest, GTE's unsatisfactory response is evidenced by the fact that it considered Noson's comments and behavior to be merely "shoptalk" -- undermining any claim that GTE viewed this as a serious problem.

However, as noted before, neither the district court nor the parties had the benefit of the Supreme Court's decision in *Morgan.* As a result, the record is under-developed in this regard. Therefore, upon remand the district court may decide in the first instance whether, under *Morgan,* the allegations regarding Noson are sufficiently related such that they can be considered for purposes of liability and, if so, whether they should nonetheless be equitably barred. We note that even if the Noson allegations cannot be considered for purposes of liability, they nonetheless may still be admissible at trial for other limited purposes. As *Morgan* notes in the context of discrete discriminatory acts, the statute does not "bar an employee from using the prior [untimely] acts as background evidence in support of a timely claim." *536 U.S. at 113*; *see also Lyons v. England, 307 F.3d 1092, 1108 (9th Cir. 2002)* (holding that under *Morgan* "appellants are permitted to offer evidence of the pre-limitations discriminatory detail assignment scheme in the prosecution of their timely claims"). The dissent itself reaches the conclusion that McGinest's hostile work environment claim survives summary judgment and thus, even on the dissent's own terms, it would be premature to limit the type of evidence McGinest can present at trial in support of his hostile work environment claim. Indeed, the dissent appears to suggest that the Noson allegations could not even be considered as background evidence to McGinest's hostile work environment claim. *See* Dissent Op. at 3045-47. Not only would this position run contrary to our precedent in *Lyons*, but it also would supplant the district court's role under *Federal Rule of Civil Procedure 16* to fashion a pre-trial order that would govern the course of the trial by preemptively purporting to exclude potentially admissible evidence.

[**24]

7 In determining whether the deprivation of the overtime received by relief supervisors was discriminatory, it is not relevant that the practice of awarding such overtime was disfavored or ultimately discontinued by the company. What is critical, however, is whether McGinest was treated differently because of his race. GTE contends that McGinest was paid nine and a half hours of overtime over a six month period during the time that the violations allegedly took place. This response only shows that the facts are in dispute regarding the extent of the alleged practice.

Additionally, McGinest was subjected to extreme racial insults, as well as more subtle taunts, by supervisors and coworkers. Racist graffiti such as "nigger" and "white is right" regularly appeared in the bathroom and on equipment, and on one occasion a management-level employee called McGinest "stupid nigger" to his face. Although it is clear that "not every insult or harassing comment will constitute a hostile work environment," "repeated derogatory or humiliating statements . . . can constitute a hostile work environment." [**25] *Ray v. Henderson, 217 F.3d 1234, 1245 (9th Cir. 2000).*

In evaluating the significance of the statements in question, we consider the objective hostility of the workplace from the perspective of the plaintiff. *Nichols, 256 F.3d at 872*; *Ellison v. Brady, 924 F.2d 872, 878-79 (9th Cir. 1991).* In *Ellison*, in the context of sexual harassment, we evaluated objective hostility from the perspective of a reasonable woman. As the Supreme Court has noted, "Hostile work environment claims based on racial harassment are reviewed under the same standard as those based on sexual harassment." *Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. at 116 n.10.* We now state explicitly what was clear from our holding in *Ellison*, that allegations of a racially hostile work-place must be assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff. [8]

8 Following the Supreme Court's decision in *Harris v. Forklift Systems*, which referred to "an environment that a reasonable person would find hostile or abusive," *510 U.S. at 21*, a number of courts refused to apply a reasonable person standard based on the perspective of a person sharing the characteristics of the plaintiff. *See, e.g., Gillming v. Simmons Indus., 91 F.3d 1168, 1172 (8th Cir. 1996)*; *Watkins v. Bowden, 105 F.3d 1344, 1355-56 (11th Cir. 1997)*. However, in *Oncale*, the Supreme Court recharacterized the *Harris* statement, making it clear that it is proper to use an individualized standard based upon the characteristics of the plaintiff. *523 U.S. at 81* ("We have emphasized, moreover, that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.' ").

[**26] In *Ellison* we noted that "[a] complete understanding of the victim's view requires, among other things, an analysis of the different perspectives of men and women." *924 F.2d at 878*. We explained:

> because women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior. Women who are victims of mild forms of sexual harassment may understandably worry whether a harasser's conduct is merely a prelude to violent sexual assault. Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive.

Id. at 879 (citations omitted). Our analysis of the importance of interpreting gender discrimination from the perspective of a reasonable woman reverberates powerfully in the context of racial harassment. *See Stingley v. Arizona, 796 F. Supp. 424, 428-29 (D. Ariz. 1992)* (noting that "*Ellison's* reasoning may be applied seamlessly to [*1116] racist environment claims," and implementing a "reasonable person of the same gender and [**27] race or color" standard).

Racially motivated comments or actions may appear innocent or only mildly offensive to one who is not a member of the targeted group, but in reality be intolerably abusive or threatening when understood from the perspective of a plaintiff who is a member of the targeted group. "The omnipresence of race-based attitudes and experiences in the lives of black Americans [may cause] even nonviolent events to be interpreted as degrading, threatening, and offensive." *Harris v. International Paper Co., 765 F. Supp. 1509, 1516 (D. Me. 1991)* (noting that "instances of racial violence or threatened violence which might appear to white observers as mere 'pranks' are, to black observers, evidence of threatening, pervasive attitudes"), *vacated in part on other grounds, 765 F. Supp. 1529 (D. Me. 1991)*; *see also id.* (discussing "racial jokes, comments or nonviolent conduct which white observers are . . . more likely to dismiss as nonthreatening isolated incidents"); *Dickerson v. State of New Jersey Dep't of Human Serv., 767 F. Supp. 605, 616 (D.N.J. 1991)* ("The mere mention of the KKK invokes a long and violent history sufficient [**28] to detrimentally affect *any* reasonable person of the same race as the plaintiff.") (emphasis in original). "Title VII tolerates no racial discrimination, subtle or otherwise." *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973)*. By considering both the existence and the severity of discrimination from the perspective of a reasonable person of the plaintiff's race, we recognize forms of discrimination that are real and hurtful, and yet may be overlooked if considered solely from the perspective of an adjudicator belonging to a different group than the plaintiff.

It is beyond question that the use of the word "nigger" is highly offensive and demeaning, evoking a history of racial violence, brutality, and subordination. This word is "perhaps the most offensive and inflammatory racial slur in English, . . . a word expressive of racial hatred and bigotry." *Swinton v. Potomac Corp., 270 F.3d 794, 817 (9th Cir. 2001)* (ellipsis in original) (quotation marks omitted); *see also Daso v. The Grafton School, Inc., 181 F. Supp. 2d 485, 493 (D. Md. 2002)* ("The word 'nigger' is more than [a] 'mere offensive utterance'. [**29] . . . No word in the English language is as odious or loaded with as terrible a history."); *NLRB v. Foundry Div. of Alcon Indus., Inc., 260 F.3d 631, 635 n.5 (6th Cir. 2001)* ("That the word 'nigger' is a slur is not debatable."). "Perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as 'nigger' by a supervisor in the presence of his subordinates." *Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668, 675 (7th Cir. 1993)* (citations and internal quotation marks omitted). The direct verbal attack on McGinest and the prevalence of graffiti containing a racial slur evocative of lynchings and racial hierarchy are significant exacerbating factors in evaluating the severity of the racial hostility. [9]

9 Moreover, a trier of fact might certainly conclude that, in light of Hughes' use of a racial slur, his other abusive remarks to McGinest were also motivated by racial hostility.

[**30] The district court observed that there was little evidence of racial animus for a number of the incidents described by McGinest, noting with approval GTE's contention that "there is no necessary association between African Americans and drug dealers." However, the Third Circuit has explained persuasively that "the use of [*1117] 'code words' can, under circumstances such as we encounter here, violate Title VII." *Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1083 (3d Cir. 1996)*. The Third Circuit went on to note:

> [A] reasonable jury could conclude that the intent to discriminate is implicit in these comments. There are no talismanic expressions which must be invoked as a condition-precedent to the application of laws designed to protect against discrimination. The words themselves are only relevant for what they reveal--the intent of the speaker. A reasonable jury could find that statements like the ones allegedly made in this case send a clear message and carry the distinct tone of racial motivations and implications. They could be seen as conveying the message that members of a particular race are disfavored and that members of that race are, therefore, [**31] not full and equal members of the workplace.

Id. (citations omitted). [10] The reference to McGinest as a "drug dealer" might certainly be deemed to be a code word or phrase. In fact, reported cases have recognized the racial motivations behind this and other comments and slurs experienced by McGinest. *See, e.g., Daniels v. Essex Group, Inc., 937 F.2d 1264, 1273 (7th Cir. 1991)* (noting that employer engaged in a "not-so-subtle attempt to link drugs . . . with the plaintiff simply because he is black"); *Swinton, 270 F.3d at 799* (noting that a "reference to 'Pontiac' as an acronym for 'Poor old nigger thinks it's a Cadillac' " was a "racially offensive joke"); *Jones v. City of Overland Park, 1994 U.S. Dist. LEXIS 15238, 1994 WL 583153 (D. Kan. 1994)* (recognizing reference to plaintiff as "Aunt Jemima" as one factor in hostile environment). GTE's attempt to deny the possible racial overtones of many of the comments made to McGinest or uttered in his presence indicates a willful blindness to racial stereotyping.

10 The Third Circuit explained the significance of these holdings as follows:

> Anti-discrimination laws and lawsuits have 'educated' would-be violators such that extreme manifestations of discrimination are thankfully rare. Though they still happen, the instances in which employers and employees openly use derogatory epithets to refer to fellow employees appear to be declining. Regrettably, however, this in no way suggests that discrimination based upon an individual's race, gender, or age is near an end. Discrimination continues to pollute the social and economic mainstream of American life, and is often simply masked in more subtle forms.

85 F.3d at 1081-82.

[**32] The district court discounted the insults and hostile actions directed at McGinest by both Noson and DeLeon, reasoning that because Ketchum, a white worker, was also targeted, this behavior did not constitute actionable racial harassment. The district court erred in ignoring these interactions for several reasons. First, if racial hostility pervades a workplace, a plaintiff may establish a violation of Title VII, even if such hostility was not directly targeted at the plaintiff. *See, e.g., Woods, 925 F.2d at 1202* (holding that work environment was racially hostile where "Woods was surrounded by racial hostility, and subjected directly to some of it"); *Stingley, 796 F. Supp. at 426, 428* (finding racial and sexual harassment based in part on use of racist nicknames and slurs about another worker in presence of plaintiff); *Kishaba v. Hilton Hotels Corp., 737 F. Supp. 549, 554 (D. Haw. 1990)* ("Even if Plaintiff herself was never the object of racial harassment, she might nevertheless have a Title VII claim if she were forced to work in an atmosphere in which such harassment was pervasive."). McGinest testified at his deposition that [**33] DeLeon directed racially charged comments [*1118] at Ketchum specifically in order to anger McGinest. If racial animus motivates a harasser to make pro-vocative comments in the presence of an individual in order to anger and harass him, such comments are highly relevant in evaluating the creation of a hostile work environment, regardless of the identity of the person to whom the comments were superficially directed.

Secondly, our case law is clear that the fact that an individual "consistently abused men and women alike" provides no defense to an accusation of sexual harassment. *Steiner, 25 F.3d at 1463*; *see also id. at*

1464. DeLeon's use of racially charged words to goad both black and white employees makes his conduct more outrageous, not less so; as in *Steiner*, were the conduct sufficiently severe or pervasive it might indeed raise the possibility that Ketchum himself could raise a claim of discrimination. *Id.*

Thirdly, the district court overlooked testimony that Ketchum was harassed because of his association with black employees. "Title VII has . . . been held to protect against adverse employment actions taken because of the employee's close [**34] association with black friends or coworkers . . . ." ARTHUR LARSON, EMPLOYMENT DISCRIMINATION, § 51.02 (2d ed. 2003); *cf. Taylor v. Western & Southern Life Ins. Co., 966 F.2d 1188 (7th Cir. 1992)* (affirming Title VII judgment for employee subjected to discrimination because of interracial marriage); *Brosmore v. City of Covington, 1993 U.S. Dist. LEXIS 20733, 1993 WL 762881 (E.D. Ky. 1993)* (noting significance under Title VII of detriment due to interracial association). Ketchum was not harassed for being white, nor were racial slurs mocking or insulting whiteness directed at him. Instead, the evidence suggests that he was harassed for making friendships that crossed racial lines, and for his acts of solidarity. [11] Hostile conduct that attempts to sever or punish only those friendships that are interracial might certainly "pollute[] the victim's workplace," *Steiner, 25 F.3d at 1463*, and the district court erred in failing to consider this fact.

11 For example, following Noson's statement to McGinest that "only drug dealers can afford nice gold chains," Ketchum bought himself a gold chain which he subsequently wore to work every day.

[**35] For purposes of summary judgment, McGinest persuasively demonstrates that he was subjected to a hostile work environment. He has presented evidence that over the past ten to fifteen years several racial incidents occurred each year, ranging in severity from being called racially derogatory names to experiencing a potentially life-threatening accident. As even the dissent recognizes, McGinest has raised a genuine issue of material fact with regard to the existence of a racially hostile workplace.

B. *Analysis of Remedial Measures*

Because we conclude, for purposes of summary judgment, that McGinest suffered a hostile work environment, we must consider whether GTE is liable for the harassment. As a preliminary matter, we address the district court's overall approach to the question of remediation. The district court considered the sufficiency of GTE's remedial measures on an event-by-event basis, stating: "After eliminating the incidents for which McGinest's proof is wholly inadequate, and those incidents to which [GTE] has adequately responded, McGinest's case rests on a few sporadic occurrences of arguably racially motivated conduct." Although the district court's [**36] approach does not appear unreasonable at first blush, it led the court to underestimate the impact of the environment [*1119] on McGinest and underemphasize GTE's responsibility to take remedial action to discourage discriminatory conduct. Instead, a court must first assess whether a hostile work environment existed, and then determine whether the response was adequate as a whole.

An employer's liability for harassing conduct is evaluated differently when the harasser is a supervisor as opposed to a coworker. *Swinton, 270 F.3d at 803*. An employer is vicariously liable for a hostile environment created by a supervisor, although such liability is subject to an affirmative defense. *Nichols, 256 F.3d at 877* (citing *Faragher v. City of Boca Raton, 524 U.S. at 780*). "If, however, the harasser is merely a coworker, the plaintiff must prove that . . . the employer knew or should have known of the harassment but did not take adequate steps to address it." *Swinton, 270 F.3d at 803*.

1. Vicarious Liability for Acts by Supervisors

An employer may raise a two-pronged affirmative defense to avoid vicarious liability for a hostile [**37] environment created by a supervisor. [12] *Nichols, 256 F.3d at 877*. Although GTE mentions this defense in its motion for summary judgment, it does not raise it before us. In consequence, we assume that GTE is liable for the acts of its supervisors, and we leave it to the district court to evaluate the defense if it is raised on remand. *See Smith v. Marsh, 194 F.3d 1045, 1052 (9th Cir. 1999)*. Thus, for the purposes of summary judgment we assume that GTE is liable for the offensive comments by coordinator Hughes [13] and supervisor Ledbetter, supervisor Roberts' denial of bonus pay for McGinest's overtime while a relief supervisor and refusal to provide for McGinest's automotive safety, and the derogatory comments and exposure to hazardous industrial situations by supervisor Noson.

12 The employer must show that 1) it exercised reasonable care to prevent and correct promptly any invidious harassment, and 2) that the plaintiff unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or avoid harm otherwise. *Nichols, 256 F.3d at 877*.

[**38]

13 GTE challenges McGinest's description of Hughes as *his* supervisor, but does not assert that Hughes was not *a* supervisor. Our case law does indeed distinguish between a situation in which a harasser supervises the plaintiff, where vicarious liability is available, versus those situations in which a harasser is a supervisor and yet does not

supervise the plaintiff. *See Swinton, 270 F.3d at 805*. An employer is vicariously liable for actions by a supervisor who has "immediate (or successively higher) authority over the employee." *Faragher, 524 U.S. at 806*. Thus, this distinction is not dependent upon job titles or formal structures within the workplace, but rather upon whether a supervisor has the authority to demand obedience from an employee. *Cf. Burrell v. Star Nursery, Inc., 170 F.3d 951, 956 (9th Cir. 1999)*.

The affidavits and deposition transcripts establish that the supervisorial structure of GTE was quite complex. *See, e.g.*, Declaration of McGinest (explaining "I work with five or six supervisors at one time"). If Hughes engaged in supervision of or had authority over McGinest, he would qualify as McGinest's supervisor even if the company did not define his role this way. *Swinton, 270 F.3d at 803-05*. The question of who was considered a supervisor by GTE, and whether its job categories suffice to satisfy the demarcations drawn under the case law interpreting Title VII is properly resolved by the district court on a more extensive factual record.

[**39] **2. Liability for Actions by Coworkers**

"Employers are liable for failing to remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known." *Ellison* [*1120] *v. Brady, 924 F.2d at 881* (quoting *EEOC v. Hacienda Hotel, 881 F.2d 1504, 1515-16 (9th Cir. 1989)*); *Swinton, 270 F.3d at 803*. GTE had actual knowledge of the events of which McGinest informed his immediate supervisor or manager, including the offensive comments by coworkers Daniel DeLeon, Jim Frick and Alex Talmadge, as well as the one incident of graffiti that was reported. Additionally, GTE had imputed knowledge regarding the remaining incidents of racist graffiti, because managers also used the restrooms and other facilities where this graffiti was prevalent.

GTE may nonetheless avoid liability for such harassment by undertaking remedial measures "reasonably calculated to end the harassment." *Ellison, 924 F.2d at 882*; *see also Yamaguchi v. United States Dep't of the Air Force, 109 F.3d 1475, 1482 (9th Cir. 1997)*. "The reasonableness of the remedy [**40] depends on its ability to: (1) 'stop harassment by the person who engaged in the harassment;' and (2) 'persuade potential harassers to refrain from unlawful conduct.' " *Nichols, 256 F.3d at 875* (quoting *Ellison, 924 F.2d at 882*). To be adequate, an employer must intervene promptly. *Intlekofer v. Turnage, 973 F.2d 773, 778 (9th Cir. 1992)*. Remedial measures must include some form of disciplinary action, *Yamaguchi, 109 F.3d at 1482*, which must be "proportionate[] to the seriousness of the offense," *Ellison, 924 F.2d at 882* ("Title VII requires more than a mere request to refrain from discriminatory conduct.").

GTE took action by counseling DeLeon and by painting over the racial graffiti reported in April 1998. GTE alleges that these remedial measures stopped the harassment, and were therefore sufficient to protect it from liability. However, it is clear that McGinest has presented sufficient evidence to establish disputed issues of material fact with regard to the adequacy of the remedial measures taken by GTE. In fact, on the record before us, GTE would be unable to avoid liability through its remedial [**41] measures.

First, GTE only responded to the one act of graffiti that was reported, despite the fact that GTE knew or should have known of numerous other instances. Inaction constitutes a ratification of past harassment, even if such harassment independently ceases. *Fuller v. City of Oakland, 47 F.3d 1522, 1529 (9th Cir. 1995)* (noting that Title VII condemns "the existence of past harassment, every bit as much as the risk of future harassment"); *Nichols, 256 F.3d at 875-76* ("When the employer undertakes no remedy, or where the remedy does not end the current harassment and deter future harassment, liability attaches for both the past harassment and any future harassment.").

Additionally, although painting over the graffiti was a necessary first step, the record before us reveals no actions taken by GTE to ensure that this recurrent problem would cease, [14] and in fact it did [*1121] not cease. Thus, this case resembles *Daniels v. Essex Group*, in which inadequate remediation was found where similar racist graffiti reappeared after being painted over, "the defendant made virtually no effort to investigate the incidents," *937 F.2d at 1275*, and [**42] management neither called a meeting of the workforce to condemn the racial harassment nor issued "a warning announcing the employer's abhorrence of racial harassment," *id. at 1267*.

14 GTE took no action to send a message that such graffiti was intolerable, or to recognize that it differed in kind from other graffiti prevalent in the bathrooms. *Snell v. Suffolk County, 782 F.2d 1094, 1104-05 (2d Cir. 1986)*. GTE could have heavily emphasized to all employees that serious punishment would result if the perpetrators of this or future incidents were caught, underlining the fact that such behavior was neither tolerated or condoned. *Nichols, 256 F.3d at 876*; *Daniels, 937 F.2d at 1275*. At a minimum, GTE could have informed the offended employees that it would make efforts to prevent the reappearance of such graffiti, and had a manager check the areas in

question on a regular basis to ensure that this problem did not recur. *Nichols, 256 F.3d at 876* (noting that employer conducted spot checks). On the record before us, GTE did none of these things.

[**43] Furthermore, the reactions of management upon learning about the graffiti indicate that the incident was not taken seriously. After being informed about the graffiti, supervisor Roberts first joked that he himself was responsible for it, and then added an additional "humorous" comment that had racial overtones. [15] Rather than remedying the harassment, Roberts' behavior appears to have added to it.

15 Since Roberts responded to news of the objectionable graffiti by quoting Rodney King's question, "Why can't we all just get along?" which was itself an allusion to black-white racial strife, the evidence before us implies that Roberts may well have understood the nature of the graffiti.

GTE's remediation of DeLeon's racial comments also gives cause for concern. Although counseling and a warning may suffice if successful in stopping the harassment, *see Intlekofer, 973 F.2d at 779*, GTE did not issue this warning until McGinest had filed a complaint with the EEOC. In fact, McGinest had informed [**44] his manager or immediate supervisor of the events involving Noson, Hughes, DeLeon, and others, to no avail. In each of these cases, GTE did not respond until McGinest initiated formal proceedings. This delay does not satisfy Title VII's requirement of prompt remedial action. *See, e.g., Fuller, 47 F.3d at 1528*; *Intlekofer, 973 F.2d at 778*; *Steiner, 25 F.3d at 1464*.

Taken as a whole, GTE's responses were troubling for another reason. We have been clear that in order to be adequate, remedial actions must be designed not only to prevent future conduct by the harasser, but also by other potential harassers. *See, e.g., Fuller, 47 F.3d at 1528*; *Nichols, 256 F.3d at 875*; *Ellison, 924 F.2d at 882*. GTE's actions may have been successful in persuading identified harassers to cease their activities. But over a ten-year period, McGinest was subjected to inappropriate comments by a minimum of six individuals, and was allegedly physically endangered or financially harmed through the actions of several others. On the record before us, GTE took no action to ensure that this level of [**45] harassment did not continue for the rest of McGinest's tenure at the company.

IV.

F AILURE TO P ROMOTE

The remaining two claims raised by McGinest involve GTE's failure to promote him to the position of Outside Plant Construction Installer Supervisor in October 1998. McGinest alleges that he was denied this promotion because of racial discrimination and in retaliation for his complaint to the EEOC regarding the hostile work environment.

A. *Racial Discrimination*

Under Title VII, an individual suffers disparate treatment "when he or she is 'singled out and treated less favorably than others similarly situated on account of race.' " *Jauregui v. City of Glendale, 852 F.2d 1128, 1134 (9th Cir. 1988)* (quoting *Gay v. Waiters' & Dairy Lunchmen's Union, 694 F.2d 531, 537 (9th Cir. 1982))*; *42 U.S.C. § 2000e-2(a) (2003)*. [*1122] Failure to promote is a common manifestation of disparate treatment. *See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981)*; *Warren v. City of Carlsbad, 58 F.3d 439, 440-41 (9th Cir. 1995)*; *Jauregui, 852 F.2d at 1134*. [**46]

"The plaintiff in a disparate treatment case must show the employer's intent to discriminate, but intent may be inferred from circumstantial evidence." *Id.*

(quoting *Domingo v. New England Fish Co., 727 F.2d 1429, 1435 (9th Cir. 1984)*). The parties debate at length the question of whether McGinest adduced direct or circumstantial evidence of discrimination, and the relevance of the resolution of this question to the proper analytical framework by which a disparate treatment claim is evaluated. Their confusion is understandable considering the proliferation of conflicting case law on this question. *See Costa v. Desert Palace, 299 F.3d 838, 852-53 (9th Cir. 2002)* (reviewing case law and describing it as a "quagmire that defies characterization," "chaos," and a "morass"), *aff'd by 539 U.S. 90, 156 L. Ed. 2d 84, 123 S. Ct. 2148 (2003)*. However, the Supreme Court recently brought much-needed clarity to this area of law when it affirmed our en banc opinion in *Costa v. Desert Palace*.

In *Costa*, the Supreme Court held that circumstantial and direct evidence should be treated alike, noting: "Circumstantial evidence is not only sufficient, but may also be [**47] more certain, satisfying and persuasive than direct evidence." *123 S. Ct. at 2154* (quoting *Rogers v. Missouri Pacific R.R. Co., 352 U.S. 500, 508 n.17, 1 L. Ed. 2d 493, 77 S. Ct. 443 (1957))*. Because the Supreme Court held that the distinction between direct and circumstantial evidence is irrelevant to determining what analytical framework to apply, we need not resolve the parties' arguments regarding the proper characterization of McGinest's evidence.

Our decision in *Costa* establishes that although the *McDonnell Douglas* burden shifting framework [16] is a useful "tool to assist plaintiffs at the summary judgment stage so that they may reach trial," "nothing compels the

parties to invoke the *McDonnell Douglas* presumption." *299 F.3d at 855*. Rather, when responding to a summary judgment motion, the plaintiff is presented with a choice regarding how to establish his or her case. McGinest may proceed by using the *McDonnell Douglas* framework, or alternatively, may simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated GTE. *Id.* (noting that plaintiff may succeed by introducing [**48] "other sufficient evidence--direct or circumstantial--of discriminatory intent").

> 16 Under the *McDonnell Douglas* burden shifting framework, a plaintiff must first establish a prima facie case of unlawful discrimination. The burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the action. If the employer does so, the plaintiff must show that the articulated reason is pretextual. *McDonnell Douglas Corp., 411 U.S. at 802-804.*

The district court applied the *McDonnell Douglas* test. It determined that McGinest established a prima facie case of failure to promote due to racial discrimination. McGinest 1) is a member of a protected class; 2) applied for and was qualified for an open job; 3) was rejected for that job; and 4) rather than filling the position by promoting any of the interviewees, GTE transferred a white manager into the position. [17] GTE produced a legitimate, [*1123] nondiscriminatory reason for the action, claiming that it was due to a hiring [**49] freeze. The district court concluded, however, that McGinest failed to produce evidence indicating that the reason given by GTE was a pre-text, and thus granted summary judgment to GTE.

> 17 Although this fourth factor is not identical to the one employed in *McDonnell Douglas*, it is widely recognized that the test is a flexible one and the prima facie case described was "not necessarily applicable in every respect to differing factual situations." *McDonnell Douglas, 411 U.S. at 802 n.13*; *see also Swierkiewicz v. Sorema, 534 U.S. 506, 152 L. Ed. 2d 1, 122 S. Ct. 992 (2002)*. GTE's suggestion that McGinest does not establish the fourth factor is unpersuasive.

Once the defendant produces evidence of a legitimate non-discriminatory reason to counter the plaintiff's demonstration of a prima facie case, the *McDonnell Douglas* "presumption of discrimination 'drops out of the picture.' " *Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000)* (quoting [**50] *St. Mary's Honor Center v. Hicks, 509 U.S. 502, 511, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993)*). Because the district court correctly found that the first two steps of the *McDonnell Douglas* framework had been established, "the sole remaining issue was 'discrimination *vel non*.' " *Id.* (quoting *U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714, 75 L. Ed. 2d 403, 103 S. Ct. 1478 (1983)*). Thus, despite the parties' vociferous contentions, in this case it is not particularly significant whether McGinest relies on the *McDonnell Douglas* presumption or, whether he relies on direct or circumstantial evidence of discriminatory intent to meet his burden. Under either approach, McGinest must produce some evidence suggesting that GTE's failure to promote him was due in part or whole to discriminatory intent, and so must counter GTE's explanation that a hiring freeze accounted for its failure to promote him.

As McGinest argues, the absence of any documentation confirming that a company hiring freeze was in place during the relevant time period is sufficient to raise a genuine factual dispute as to whether the asserted reason was pretextual. Indeed, even if such decisions [**51] were commonly conveyed to yard managers by word-of-mouth, the fact that a company the size of GTE does not have a memorandum, meeting notes, or other evidence of this hiring freeze or the financial difficulties that allegedly spurred the hiring freeze provides circumstantial evidence that the hiring freeze did not in fact exist. [18]

> 18 McGinest requests that we take judicial notice of GTE's Annual Report from 1998 as well as a news release from the California Public Utilities Commission. These documents allegedly show that, contrary to the explanation given for the hiring freeze, GTE was in glowing financial health in 1998. However, since these documents were not presented to the district court, we do not consider this information in reaching our conclusion.

"Proof that the defendant's explanation is unworthy of credence is [a] form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." *Reeves, 530 U.S. at 147*. Additionally, GTE's permissive [**52] response to harassing actions undertaken by coworkers and supervisors, combined with the absence of black supervisors and managers in the workplace, also is circumstantial evidence of pretext. *See McDonnell Douglas, 411 U.S. at 804-05* (noting that possible methods of demonstrating pretext include "treatment of [the employee] during his prior term of employment . . . and [the employer's] general policy and practice with respect to minority employment," such as [*1124] information demonstrating "a general pattern of discrimination against blacks"); *Warren, 58 F.3d at 443-44* (holding that plaintiff raised a genuine issue of material fact as to employer's motive by showing that less-qualified white employees were promoted over him, combined with racist remarks and statistical evidence);

Bergene v. Salt River Project Agric. Improvement & Power Dist., 272 F.3d 1136, 1143 (9th Cir. 2001) (holding that absence of female supervisors was one factor establishing pretext for failure to promote).

We have held that "very little [] evidence is necessary to raise a genuine issue of fact regarding an employer's motive; any indication of discriminatory [**53] motive . . . may suffice to raise a question that can only be resolved by a fact-finder." *Schnidrig, 80 F.3d at 1409*. "When [the] evidence, direct or circumstantial, consists of more than the *McDonnell Douglas* presumption, a factual question will almost always exist with respect to any claim of a nondiscriminatory reason." *Sischo-Nownejad, 934 F.2d at 1111*; *see also Lam, 40 F.3d at 1564*. As the district court recognized, this is a close case. Such uncertainty at the summary judgment stage must be resolved in favor of the plaintiff. *Id.* ("We require very little evidence to survive summary judgment precisely because the ultimate question is one that can only be resolved through a 'searching inquiry'--one that is most appropriately conducted by the fact finder, upon a full record."). Because a number of factors cast doubt upon GTE's proffered explanation for its failure to promote McGinest, while providing support for his contention regarding racial discrimination, McGinest has met his burden of showing "a genuine factual issue with regard to discriminatory intent." *Lam, 40 F.3d at 1559*.

B. *Retaliation*

[**54] *Section 704 of Title VII* prohibits retaliation against an employee for opposing unlawful discrimination. *42 U.S.C. § 2000e-3(a) (2003)*. Like discrimination, retaliation may be shown using the *McDonnell Douglas* burden shifting frame-work. To establish a prima facie case of retaliation under Title VII, McGinest must show 1) that he acted to protect his Title VII rights; 2) that an adverse employment action was thereafter taken against him; and 3) that a causal link existed between the two events. *Steiner, 25 F.3d at 1464*. If a prima facie case is established, the burden then shifts to the employer to proffer an alternative explanation for its action, which the employee may attempt to rebut.

McGinest has established the first and second prongs of the prima facie case. [19] However, McGinest has not presented sufficient evidence to demonstrate a causal link between his complaint and the denial of the promotion. Because the two events were separated by a year and a half, the timing alone does not establish a connection, and McGinest does not offer any other explanation. *See Villiarimo v.* [*1125] *Aloha Island Air, Inc., 281 F.3d 1054, 1065 (9th Cir. 2002)*. [**55] Thus, we affirm the district court's dismissal of the retaliation claim.

19 By filing a complaint with the EEOC, McGinest engaged in the quintessential action protected by *§ 704*. *See Ray v. Henderson, 217 F.3d 1234, 1240 n.3 (9th Cir. 2000)* ("As the statutory language . . . indicates, filing a complaint with the EEOC is a protected activity."); *Hashimoto v. Dalton, 118 F.3d 671, 680 (9th Cir. 1997)* (holding that simply meeting with EEO counselor is protected activity because it constitutes participation "in the machinery set up by Title VII to enforce its provisions"). An adverse employment action is one that "is reasonably likely to deter employees from engaging in protected activity," *Ray, 217 F.3d at 1243*; clearly, denial of a promotion qualifies as an adverse employment action. *See, e.g., Bergene, 272 F.3d at 1141*; *Brooks v. City of San Mateo, 229 F.3d 917, 928 (9th Cir. 2000)*.

CONCLUSION

We reverse the [**56] district court's grant of summary judgment on the first two counts, and remand to the district court for further proceedings. McGinest established the existence of material questions of fact with regard to whether GTE created and failed to remedy a racially hostile working environment. McGinest also has shown a genuine issue of material fact as to whether GTE's failure to promote him was based on racial discrimination. However, we affirm the district court's dismissal of the retaliation claim.

Appellant shall recover costs on appeal. **AFFIRMED** in part, **REVERSED** in part, and **REMANDED**.

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CONCUR BY: O'SCANNLAIN (In Part)

DISSENT BY: O'SCANNLAIN (In Part)

DISSENT

O'SCANNLAIN, Circuit Judge, concurring in part and dissenting in part:

I agree that the court must reverse the grant of GTE's motion for summary judgment and remand for further proceedings on McGinest's hostile work environment; regrettably, however, I cannot concur in the majority's analysis, and thus dissent from the reasoning of Part III. I disagree with the court's reversal of the dismissal on summary judgment of McGinest's discriminatory failure to promote claim and thus dissent from Part IV.A. [**57] ; I would affirm. But I do agree that we must affirm dismissal on summary judgment of McGinest's retaliatory failure to promote claim, and thus concur in Part IV.B. of the court's opinion as to result and analysis.

Because I believe the majority's opinion sidesteps *Raytheon Co. v. Hernandez, 540 U.S. 44, 157 L. Ed. 2d 357, 124 S. Ct. 513 (2003)*, essentially abandons *Nat'l*

R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 153 L. Ed. 2d 106, 122 S. Ct. 2061 (2002), and creates an unreasonable expansion of Title VII liability in the workplace, I must respectfully dissent from the opinion of the court to the foregoing extent.

I

Title VII prevents the establishment of a "hostile work environment" that becomes "sufficiently severe or pervasive to alter the conditions of [one's] employment." *Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1986)*; *see 42 U.S.C. § 2000e-2(a)(1)*.

Our evaluation of such claims requires an examination of the totality of the circumstances. *Harris v. Forklift Systems, Inc., 510 U.S. 17, 23, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993)* ("Whether an environment is 'hostile' or 'abusive' can be determined only by looking [**58] at all the circumstances."); *Fuller v. City of Oakland, 47 F.3d 1522, 1527 (9th Cir. 1995)* ("Hostility [under Title VII] must be measured based on the totality of the circumstances."). This appraisal includes consideration of "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris, 510 U.S. at 23*.

A

However, before considering the totality of the circumstances, we must first determine exactly which of the plaintiff's claims properly form a part of that inquiry. Because the district court dismissed this case on summary judgment, we must review the evidence in the light most favorable to the plaintiff. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contr. Ass'n, 809 F.2d 626, 630-31 (9th Cir. 1987)*. Yet even under this deferential [*1126] standard, not every allegation must be taken at face value, nor is every factual claim necessarily available to impose potential liability. The majority, regrettably, appears to assume the opposite, for its analysis hardly considers the suitability [**59] of McGinest's allegations. The court's opinion appears not only to presume that all facts are true, but that every allegation is admissible evidence of a hostile work environment upon which liability may be based. There is no recognizable legal support for this approach.

Specifically, my review of our precedent indicates that there are at least two kinds of allegations that may not be considered at summary judgment as evidence of liability for a particular hostile work environment claim: First, if any distant act "was no longer part of the same hostile environment [*1127] claim, then the employee cannot recover for the previous act[]." *Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 118, 153 L. Ed. 2d 106, 122 S. Ct. 2061 (2002)*. Second, claims that amount to mere "conclusory allegations" are insufficient to merit consideration. *Hernandez v. Spacelabs Med., Inc., 343 F.3d 1107, 1116 (9th Cir. 2003)*. With these principles in mind, I believe it is necessary to undertake a careful review of McGinest's numerous allegations before one may fairly judge the strength of his Title VII claim.

1

GTE urges that the events involving supervisor Noson must be excluded as distant acts beyond the [**60] statutory scope of the rest of McGinest's hostile work environment claim. Title VII does indeed require that a "charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred." [1] *42 U.S.C. § 2000e-5(e)(1)*. Of course, we must not engage in overly literal interpretations of this statute of limitations. *See Morgan, 536 U.S. at 115-21*. So the simple fact that some of the alleged discriminatory acts occurred outside the limitations period does not automatically preclude their admission. Rather, "consideration of the entire scope of a hostile work environment claim, including behavior alleged outside the statutory time period, is permissible for the purposes of assessing liability, so long as an act contributing to that hostile environment takes place within the statutory time period." *Id. at 105*.

1 The statute extends this limitations period to 300 days in certain circumstances not relevant here. *See § 2000e-5(e)(1)*.

[**61] a

The majority, however, appears to take this concept to an extreme, implying that so long as any single act occurs within the statute of limitations, *all* alleged acts--no matter how far in the past--become part of the same hostile work environment claim. It dismisses the statute of limitations argument in a footnote, and explicitly considers Noson's conduct because it is merely "possible" that it functioned as part of the same claim. Maj. Op. at 3019-21 n.6. It is our duty faithfully to apply controlling precedent, and I do not believe that *Morgan*'s threshold can be so pitifully low. Indeed, I believe the majority's "possibly part of the same claim" standard eviscerates *Morgan*'s limitation.

To the contrary, I believe *Morgan* establishes a workable and relatively stringent standard: "if a [distant] act . . . had no relation to the [recent] acts . . ., or for some other reason, such as certain intervening action by the employer, was no longer part of the same hostile environment claim, then the employee cannot recover for the previous acts." [2] *Morgan, 536 U.S. at 118*. Employers retain additional protections beyond even this principle because [**62] distant acts alleged as part of a single hostile work environment claim also remain "subject to

waiver, estoppel, and equitable tolling when equity so requires." *Id. at 121* (internal quotation omitted).

> 2 While I may agree with the majority that this rather broad standard has yet to be fully fleshed out, I must respectfully disagree with its assertion that such imprecision somehow turns clear Supreme Court precedent into nothing more than an "implication." *See* Maj. Op. at 3019-21 n.6.

With respect, while the court's opinion formally recognizes this language, it fails to apply it. The majority appears to argue that we need not take *Morgan* seriously because "neither the district court nor the parties had the benefit of" that decision. Maj. Op. at 3019-21 n.6. This is irrelevant. *Morgan* imposes a rule of law establishing when a particular fact may support a legal claim. And, of course, "our duty is to interpret the law." *Seaman v. Comm'r of Internal Revenue, 479 F.2d 336, 338 (9th Cir. 1973).* [**63]

The majority also emphasizes that *Morgan* deals with an employer's "*liability*." Maj. Op. at 3019-21 n.6 (emphasis in original). I am unable to recognize the significance of such a distinction, or why it would counsel for application of the majority's nearly nonexistent threshold. The district court's summary judgment order, which we now review on appeal, determined precisely the issue of GTE's potential liability. *Morgan* is thus directly relevant, and I respectfully believe that we must determine which of McGinest's assertions are properly encompassed in his hostile work environment claim *before* determining whether that claim properly survives summary adjudication. For it is clearly incorrect to consider every claim a plaintiff makes--no matter how stale or unsupported --in adjudicating a motion for summary judgment. *See Morgan, 536 U.S. at 118*; *Hernandez, 343 F.3d at 1116.*

Of course, determining the scope of events that may be considered for purposes of establishing liability does not affect *Federal Rule of Civil Procedure 16* and the admissibility of stale evidence for other purposes. For example, [**64] an utterance, though time barred for purposes of liability, may be admissible to challenge the credibility of a witness as a prior inconsistent statement. *See Fed. R. Evid. 613.*

But summary judgment is about establishing liability. Thus, I must respectfully disagree with the majority's implication that both *Morgan* and *Lyons v. England, 307 F.3d 1092 (9th Cir. 2002)* might be extended to allow time-barred evidence to be used at summary judgment as "background evidence" of a hostile work environment claim. *See* Maj. Op. at 3019-21 n.6. The quoted language from *Morgan*, and the entire *Lyons* opinion, dealt only with discrete act claims. In such cases, a plaintiff may rely on time-barred evidence as a "background" to help establish that an adverse employment decision was actually based on discriminatory animus. *See Lyons, 307 F.3d at 1110* ("In the context of a racial disparate treatment claim, admissible background evidence must be relevant to determine the ultimate question: whether the defendant intentionally discriminated against the plaintiff because of his race." (internal quotations and edit marks [**65] omitted)).

However, "hostile environment claims are different in kind from discrete acts." *Morgan, 536 U.S. at 115.* [*1128] Under *Morgan*, evidence of a hostile work environment may extend beyond the statute of limitations period *if it is related. See id. at 118.* But if evidence is *un*related to a claim, it must necessarily be irrelevant to that same claim. *See, e.g., Eclipse Assoc. v. Data General Corp., 894 F.2d 1114, 1119 (9th Cir. 1990)* (equating "unrelated" with "irrelevant"). So evidence that is time-barred under the *Morgan* standard cannot be considered at summary judgment because it is simply not relevant to the question of whether *wholly unrelated* conduct amounts to a hostile work environment. The very term "background evidence" makes little sense in this context because no "back-ground" of discriminatory animus can be established from unrelated, irrelevant activity. Such evidence may well have *triggered* liability in the past, but that was liability upon which the plaintiff declined to act. Allowing consideration of stale, unrelated events as "background evidence" at summary judgment guts the concept of a statute [**66] of limitations in the hostile work environment context, and only serves as a back-door method by which to introduce time-barred statements to avoid summary dismissal.

I also find no basis for the assertion that we lack facts necessary properly to interpret *Morgan*. Maj. Op. at 3019-21 n.6. The record includes detailed information regarding Noson's actions, as amply related by the majority's opinion. The district court made specific findings regarding GTE's response, and when and where the alleged conduct occurred, including the fact that it "took place seven years before McGinest filed his EEOC complaint." Thus, unlike the majority, I feel obligated to determine whether McGinest's claims regarding Noson are time-barred under a standard stringent enough to comply with *Morgan*'s dictates.

b

McGinest's claims involving Noson occurred in the late 1980s culminating in Noson's dual apologies, as requested by GTE, in 1990. McGinest makes no further allegation of objectionable conduct by Noson since those apologies. The next formal notice of discriminatory conduct occurred after McGinest filed his EEOC complaint in 1997. In fact, McGinest himself alleges no discrimination of any kind [**67] between 1990 and 1995, when he claims to have been denied equal bonus

pay. Construed as liberally as possible, [3] no less than 1,500 days elapsed between the successful resolution of Noson's behavior and all other alleged misconduct. Strikingly, 1,500 days amounts to more than *eight* full, consecutive Title VII statutory limitations periods. *See 42 U.S.C. § 2000e-5(e)(1)*. Each of the exclusions set forth in *Morgan*, therefore, apply.

> 3 As discussed below, I do not believe we may consider McGinest's unequal pay claim. However, for purposes of this analysis, I assume even that these facts may form part of a single hostile work environment claim.

First, the acts involving Noson cannot reasonably be understood to have any "relation to" the subsequent allegations setting forth a hostile work environment claim. During the intervening several years, McGinest received at least one change in job title and at least one transfer, such that he no longer worked with or for Noson, and [**68] no longer worked at the same GTE location. In fact, the only relationship between these distant acts and all the other alleged conduct is that (1) they were discriminatory; and (2) GTE employed McGinest throughout.

Contrary to the majority's implication, I do not believe these facts alone can establish [*1129] a sufficient "relation" as that term has been defined by the Supreme Court. *See Morgan, 536 U.S. at 118*. This is because every hostile work environment claim is by definition asserted against a single employer for discriminatory conduct. Thus, the majority's version of "relation" would be satisfied even if a plaintiff alleged only two instances of differing forms of offensive conduct, perpetrated by different people, in different locations, separated by twenty-five years.

The Supreme Court has not yet given us specific guidance on the precise contours of a sufficient relation, so, for now, this is our job. Perhaps evidence of adequate relation might consist of the following: [4] an identity of offenders, an identity of location, an identity of a sufficiently distinct mode of harassment, or a reasonable identity of time in relation to the applicable statute of limitations. [**69] McGinest failed to submit any such evidence. The offenders differed, the place of the offense differed, and, even if all the alleged conduct was discriminatory by nature, the particular form of abuse differed. And, taken in the light most favorable to McGinest, there is no reasonable identity of time. *Morgan* itself provides a guiding example. Based on a 300 day statute of limitations, the Court concluded that conduct extending over a 400-day period--even if separated by 300 days within that time-- reasonably could be construed as part of the same claim. *Id. at 118*. In McGinest's case, discriminatory conduct separated by at least *1,500 days* cannot be understood to present a reasonable identity of time in relation to the *180-day* statute of limitations.

> 4 This list represents my own effort at interpreting and applying *Morgan*'s relation requirement. *Morgan, 536 U.S. at 118*. It is not necessarily exhaustive, nor is any one factor necessarily sufficient.

Second, [**70] it is conceded that GTE engaged in "certain intervening action" to prevent Noson's conduct from reoccurring. *Id.* For, while GTE concluded that there was no racial discrimination, it nonetheless required Noson to apologize. Perhaps McGinest may have preferred a stronger response from GTE. But the fact that there are no allegations of harmful conduct by Noson--or by anyone else for several years-- necessarily establishes that GTE's intervening response was at least sufficient to maintain an acceptable work environment for eight full, consecutive exhaustions of the statute of limitations. [5]

> 5 The majority suggests that GTE's internal understanding of the nature of the conduct somehow displaces the undisputed fact that it *actually took* intervening action--*twice*. *See* Maj. Op. at 3019-21 n.6. It is irrelevant that GTE described Noson's behavior as "shoptalk," for that subjective characterization did not change the fact that it nonetheless demanded that Noson put a stop to it. Under the majority's theory, a company which, in an effort to avoid a potential lawsuit, undisputably responded to and remedied an instance of offensive conduct may nevertheless be liable for creating a hostile work environment because "avoiding a lawsuit" presumably would not provide the basis for a sufficiently "[]satisfactory response." Maj. Op. at 3019-21 n.6.
>
> The majority cites no legal authority for the quasi-existential proposition that the subjective motivation for an action might somehow undermine the very existence of the action itself. Thus, with respect, I find no basis for the majority's conclusion that GTE "did not respond" to Noson's conduct. Maj. Op. at 3032. The issue here is not whether McGinest felt validated by his employer, but whether GTE may remain liable for conduct it intended to stop, and did stop for at least four years. *See Morgan, 536 U.S. at 118*.

[**71] Finally, if Noson's conduct created a hostile work environment in 1990, even despite GTE's response, McGinest had by 1995 waived his right to bring any resulting Title VII claim many times over. It is [*1130] contrary to the principles of equity to allow McGinest to include these allegations as part of a hostile work

environment claim arguably "redeveloping" nearly five years later. For, "when [a] delay is caused by the employee, ... the federal courts have the discretionary power to locate 'a just result' in light of the circumstances peculiar to the case." *Id. at 121* (internal citations and quotations omitted). It might be one thing if discrete acts making up the hostile work environment claim continued at regular intervals for a period significantly longer than the 180-day limitation. Yet we should not countenance McGinest's attempts to revive the Noson allegations when, after at least 1,500 days of experiencing acceptable working conditions, he failed to alert the EEOC and failed to file suit. He should not now retroactively invoke these claims after so long a period of apparent calm.

For these reasons, I respectfully disagree with the majority's conclusion that [**72] Noson's conduct may form the basis for McGinest's present hostile work environment claim. Instead, I believe they are excluded by *§ 2000e-5(e)(1)*.

2.

GTE would also exclude certain factual claims as mere "conclusory allegations." *Hernandez, 343 F.3d at 1116*. The majority briefly dispenses with this argument. *See* Maj. Op. at 3019 n.5 (accepting McGinest's testimony because it "would suffice to enable a reasonable trier of fact to conclude that discrimination had occurred, without the need for further corroborating evidence"). The majority apparently concludes that McGinest set forth sufficient factual detail in his allegations so as to survive summary judgment. *See id.* (relying on *United States v. One Parcel of Real Prop., 904 F.2d 487, 491-92 (9th Cir. 1990)* (denying summary judgment for the government in a land forfeiture case)). However, *One Parcel* is not a Title VII case, where the analysis is somewhat more nuanced. For, in the hostile work environment context, McGinest must demonstrate something more than evidence suggesting that he experienced hostility. He must also sufficiently demonstrate that any hostility arose "because of [**73] [his] race." *42 U.S.C. § 2000e-2(a)(1)*; *see Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158, 1174 (9th Cir. 2003)* (holding, in work-place sexual harassment context, that even if supervisor-employee sexual relations occurred, "we require more than conclusory allegations that the supervisor proposed a sexual liaison and the employee responded to the overtures in order to protect her employment interests"). A plaintiff might allege sufficient detail to suggest that a hostile event occurred, but fail to provide anything more than the unsupported conclusion that race motivated it. I am not certain whether the majority fully considered this latter requirement. For, in my view, two of McGinest's claims appear to fail under this standard.

a

First is the incident involving McGinest's truck tire. No one disputes that he was involved in a serious automobile accident due to a blown-out tire. McGinest alleges that not long before the accident, he requested and was denied new tires by GTE mechanics--even though at least one supervisor agreed that they looked bald. McGinest arguably produced sufficient evidence to suggest that such a denial occurred.

[**74] Yet McGinest includes this incident in his hostile work environment claim not because an alleged denial occurred, but because such a denial was based on his race. Unfortunately, however, McGinest [*1131] submitted no evidence to substantiate this charge. He does not claim, for instance, that the mechanics directly said or did anything to him to suggest that there was a racial component to such a denial. Nor does he present any circumstantial evidence that GTE provided mechanical services in a discriminatory manner.

Rather, McGinest relies only on the deposition testimony of Brand, which offers no support for his claim. Brand, who is white, did agree that sometimes it "seemed" that vehicles driven by African-Americans were not "given the same level of maintenance as vehicles driven by white employees." However, he explicitly noted that this was only one possible interpretation of the mechanic's behavior--one that even he acknowledged was not necessarily supported by the facts. For Brand conceded that some of the same mechanics treated him poorly also, while they treated at least one other African-American employee "pretty well." Ultimately, the best that Brand could conclude was that "it [**75] could have been racial. It could have been just personality." By Brand's own admission, then, his direct experience and resulting testimony could not form a sufficient supporting basis for McGinest's allegations.

McGinest's accident was undoubtedly a traumatic experience. And given some of his experiences at GTE in other contexts, he might understandably suspect wide-ranging racial discrimination. Nevertheless, our precedent makes clear that individual claims of discriminatory treatment must be "supported by facts." *Id.* With respect to this allegation, at least, McGinest has failed to provide such evidence, and I do not believe we may consider it as part of his overall hostile work environment claim.

b

McGinest's claim of differential bonus overtime pay presents a similar problem. McGinest submitted time sheets showing that several white employees received more overtime pay than McGinest did over a (roughly) six-month time period in 1996. [6] Nevertheless, as noted above, McGinest must demonstrate not only that this differential existed, but that it arose *on account of* his race. *See 42 U.S.C. § 2000e-2(a)(1)* (prohibiting

discrimination "because [**76] of such individual's race").

> 6 In the absence of additional evidence, the simple fact that some hourly employees receive more overtime than others would appear to reveal little beyond the fact that some people may indeed work more hours than others. In this sense, pay differentials arising from hourly positions would seem to carry less weight than those arising from analogous salaried positions.

Here, McGinest claims that there was an "unwritten rule" regarding the payment of "relief supervisor pay," whereby arriving even five minutes early would earn employees a full hour of wages. While his immediate supervisor, Roberts, allowed others to claim this bonus, he is alleged to have prevented McGinest from doing so because of McGinest's race. [7] On the occasions McGinest attempted to note the bonus over-time on his time sheets, he alleges that Roberts erased it. While this additional information may provide context for McGinest's claims, they still rest on the conclusory allegation that the wage differential [**77] arose on account of race.

> 7 According to McGinest, this practice meant that he received no compensation for any portion of the hour he actually worked, much less a bonus for the entire hour. In other words, he claims that he was denied pay for work actually completed. Regardless, this distinction does not affect the inquiry. For evidence that McGinest was denied actual pay *or* bonus pay on account of his race would support his hostile work environment claim.

[*1132] Nevertheless, the record does not support McGinest's version of events. First, McGinest admitted in a deposition that the time sheets he submitted show no evidence of any relevant erasures. [8] Most damagingly, McGinest's own time sheets conclusively demonstrate that he actually received both overtime pay *and* "relief supervisor" pay. This clearly contradicts his assertion that he was completely barred from receiving such pay.

> 8 McGinest speculated that the EEOC might have time sheets from periods in which Roberts erased certain entries. Nevertheless, they do not appear in the record, and the time sheets McGinest did submit cover close to seven months' worth of work--almost twenty percent of the total time during which the erasures supposedly occurred.

[**78] McGinest attempts to find support in Begg's admission that GTE may have allowed the bonus overtime practice sometime prior to 1993. However, McGinest appears selectively to read Begg's testimony. While Begg may have known of this practice in the past, he stopped it in 1993 when he became manager. And McGinest specifically alleged that his denials occurred from 1995 to 1997, well after Begg testified that the practice ended. In other words, McGinest's allegations find no support in Begg's testimony.

Notably, the EEOC investigated this complaint and determined that McGinest "had in fact been paid his due relief pay." The district court, as well, specifically found that there was "no credible evidence of a differential application of any 'unwritten rule' regarding relief supervisor overtime"--much less that the differential application arose on account of race. A careful review of the evidence compels the same conclusion: McGinest's allegations involving the "unwritten" relief supervisor rule are unsupported by Begg's testimony, and directly contradicted by McGinest's own time sheets. And to the extent that McGinest's time sheets show that he received less overtime than four other [**79] white employees, he presented neither direct nor circumstantial evidence that the wage differential arose on account of race. Therefore, I believe this allegation must be excluded from our review of the totality of the circumstances, and I must dissent from the majority's use of it.

3

On the other hand, GTE's other contentions are unavailing. McGinest's remaining claims must be included as part of the "totality of the circumstances" we properly may consider. For example, at least some portion of the bathroom graffiti ("n--," [9] "P.O.N.T.I.A.C."), the banner graffiti ("n-- History Month"), Hughes's comments (referring to McGinest as "a stupid n--"), Ledbetter's comments (criticizing McGinest while comparing him to "the other colored guy who used to work here"), DeLeon's comments (referring to McGinest as "mammy"), and Talmadge's comments (saying to McGinest, "I'll retire before I work for a black man") may all reasonably be understood as explicitly, racially hostile.

> 9 For the sake of decorum, and because the court's opinion accurately recites the actual words in the record, I shall avoid the needless repetition of inflammatory language. I therefore use "n--" in place of the offensive racial slur.

[**80] DeLeon's use of the term "Aunt Jemima" may also serve as evidence of racial hostility sufficient to survive summary judgment. DeLeon did not direct the phrase at McGinest himself, but rather to a white coworker and friend of McGinest's. Perhaps DeLeon truly did lack a racially hostile motive in his use of the nickname. However, a reasonable factfinder could conclude that it was meant to isolate McGinest [*1133] by referring disparagingly, in his presence, to his friend as an African-American woman. Moreover, use of the

term itself may reasonably be construed as racially hostile, whether directed at McGinest or not. *See, e.g., Woods v. Graphic Communications, 925 F.2d 1195, 1202 (9th Cir. 1991)* (upholding hostile work environment judgment where prevailing plaintiff "was surrounded by racial hostility, and subjected directly to some of it"). Roberts's comments upon learning of the removal of the racist bathroom graffiti ("Oh well, I guess I'll have to write it again. Ah, why can't we all just get along?") arguably exhibited racial hostility as well. While GTE claims that Roberts did not know that the graffiti was racist in nature, this only creates a material factual dispute [**81] precluding summary judgment.

Finally, McGinest offered sufficient supporting evidence, including an affidavit from coworker Brand, from which a reasonable factfinder could conclude that at least some employees, including Talmadge and Frick ("I refuse to work for that dumb son of a bitch"), may have refused to work with McGinest because of his race.

B

Once identifying which assertions are relevant and properly supported, we must consider whether McGinest presented sufficient evidence to survive summary judgment on his hostile work environment claim. Because the set of facts I review differs from that of the majority, I must conduct an independent analysis.

Three important principles bear upon the inquiry. First, because McGinest appeals from summary judgment dismissal, we must review the evidence in the light most favorable to him. *T.W. Elec., 809 F.2d at 630-31.* Second, "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances." *Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81, 140 L. Ed. 2d 201, 118 S. Ct. 998 (1998)* (internal quotation omitted). [**82] [10] Finally, McGinest's evidence must "prove that the conduct at issue was not merely tinged with offensive . . . connotations, but actually constituted discrimination . . . because of . . . [race]." *Id. at 81* (emphasis in original, internal quotation omitted).

10 While *Oncale* dealt with sexual harassment, the Supreme Court instructs that "hostile" work environment claims based on racial harassment are reviewed under the same standard as those based on sexual harassment." *Morgan, 536 U.S. at 116 n.10.*

1

With these principles in mind, I agree with the district court that this case presents a "close question" of whether a proper review of McGinest's admissible evidence suggests that GTE may be held liable in this case. Ultimately, however, I am satisfied that McGinest presented a triable issue of material fact on whether he was subjected to a hostile work environment. First, the opprobriousness of most of the comments, and the frequency with which they arose, could lead [**83] a reasonable fact-finder to conclude that together they amounted to more than "a mere offensive utterance." *Harris, 510 U.S. at 23*; *Swinton v. Potomac Corp., 270 F.3d 794, 817 (9th Cir. 2001)* (describing "n--" as "perhaps the most offensive and inflammatory racial slur in English"). Here, the repeated invocation of highly offensive language in a variety of contexts may be understood to have created a humiliating atmosphere as seen from the objective perspective of a reasonable African-American. [*1134] *Oncale, 523 U.S. at 81*; *Harris, 510 U.S. at 21* (requiring a hostile work environment to be "severe or pervasive enough to create an objectively hostile or abusive work environment"). Further, at least the stated refusal of certain colleagues to work with McGinest because of his race may have "unreasonably interfered" with [McGinest's] work performance." *Harris, 510 U.S. at 23.* Finally, McGinest's frequent complaints, both formal and informal, reasonably allow the conclusion that he "subjectively perceived" the environment to be abusive." *Id. at 21.*

Even if a hostile working environment exists, [**84] "an employer is only liable for failing to remedy harassment of which it knows or should know." *Fuller, 47 F.3d at 1527.* As the majority correctly notes, when a supervisor engages in harassing conduct, the employer generally may be held "vicariously liable for a hostile environment created by a supervisor." *Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 877 (9th Cir. 2001).* In supervisor-harassment circumstances, then, GTE may not defend for lack of knowledge of the conduct. Therefore, no notice is required for the comments made by supervisors Ledbetter and Roberts. Hughes is a somewhat more complicated case. Both McGinest and the EEOC describe Hughes as "[McGinest]'s Manager," but GTE challenges whether he was McGinest's manager or just *a* manager. This only demonstrates that there is genuine factual dispute on the issue. At this stage of the proceedings, then, I agree that we must accept McGinest's allegations as true and that GTE would be vicariously liable for Hughes's comments as well. Still, comments by these three men make up a relatively small portion of McGinest's allegations.

2

Employers are not necessarily vicariously liable [**85] for coworker harassment, however, in which case lack of notice can defeat hostile work environment claims. *Swinton, 270 F.3d at 803.* McGinest alleges that he notified his immediate supervisors of at least one instance of offensive bathroom graffiti, of DeLeon's comments, of Talmadge's comments, and of the stated